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A New Era of Economic Growth in Iran: Application of the Iran-United States Claims Tribunal Opinions to Bilateral Investments with Iran

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A New Era of Economic Growth in Iran: Application of the Iran–United States Claims Tribunal Opinions to Bilateral Investments with Iran

George F. Salamy*

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I. INTRODUCTION

After years of political and economic conflict between the United States and Iran, a movement toward improving relations between these two countries has

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recently arisen.¹ As relations between Iran and the United States strengthen, the potential for business investment planning in Iran continues to grow for an international practitioner.² In order to adequately counsel her client on investments in Iran, a practitioner must be able to reasonably predict the legal outcome of a transnational dispute arising from an investment in Iran. This Comment provides such a basis for planning a transnational agreement.

This Comment provides a foundation for a legal practitioner who is considering plans for commercial transactions with foreign countries where no applicable case law, treaty, or convention currently exists. Iran is used as a model for this analysis, due to its rich and turbulent history with the United States³ and the significant case law resulting from the hundreds of cases heard before the Iran-United States Claims Tribunal.⁴ Further, the recent developments in Iran calling for improved relations between the United States and Iran provide additional information for the analysis.⁵ Although Iran is discussed, the analysis provided in this Comment may be applicable to a transaction with any country or region where no prior law has developed between those two nations.

1. See John Daniszewski, *Iranians Want U.S. To Help Them Pursue Happiness Persian Gulf: Amid Stagflation, Many See Renewed Ties with America as Key to Growth and More Freedom*, L.A. TIMES, Sept. 6, 1998, at A6 (stating that many citizens of Iran are hopeful that Iran's new President, Mr. Khatami, will succeed in bringing more freedom to Iran and improve economic relations with the West). But see Daniel Pearl, *Rial Problems: Where Brad Pitt Is Hot and Shoe Sales Aren't: Iran and Its Discontents*, WALL ST. J., June 19, 1998, at A1 (suggesting that many conservative Iranian economic advisors and cabinet members are still suspicious of the West's intention); see also Elaine Sciolino, *Iranian President Says U.S. Must Alter Policies If Talks Are To Begin*, HOUSTON CHRON., Sept. 23, 1998, at 24 (proclaiming that U.S. must take concrete steps in changing its policy toward Iran before relations can improve).

2. See *Political Outlook*, MEED QUARTERLY REPORT, June 1, 1998, at 3 (noting that Iran-U.S. business dealings have evolved while foreign relations between the two countries have undergone considerable transformations in recent months); see also Stephen J. Glain, *Foreign-Currency Shortage Hobbles Iran: Overseas Investors Find Tehran Can't Finance Big Deals*, WALL ST. J., Oct. 12, 1998, at A14 (indicating that Iran is in desperate need of several goods and services including: spare machine parts to support its agricultural industry, tools, and luxury items).

3. See *infra* notes 17-79 and accompanying text (discussing the extensive investment history of the United States in Iran, the subsequent Iranian Revolution, and the attempts to resolve disputes arising from the uprising by creating the Iran-U.S. Claims Tribunal).

4. See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990) (claiming that some believe that the Iran-U.S. Claims Tribunal is the most vital body of arbitration law in history and is an invaluable source to attorneys); see also CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 658 (1998) (explaining how the Tribunal is the largest international tribunal in history responsible for resolving claims between a Western and non-Western country).

5. See Pearl, *supra* note 1 (advocating new relations between Iran and the United States); see also Clinton Reinforces Albright's Friendly Overture to Iran: President Says United States is Seeking Genuine Reconciliation and Exploring What the Future Might Hold, GLOBE & MAIL, June 19, 1998, at A14 [hereinafter Clinton Reinforces Albright's Friendly Overture] (detailing President Clinton's belief that Iran was changing for the better perhaps leading to improved relations with the United States in the future); see also China: West Offers Olive Branch to Iran, CHINA DAILY, Sept. 1, 1998 (indicating that French President Jacques Chirac extended an invitation to Iranian President Khatami to visit France); see also Clinton: Let's Renew Friendship With Iran, ORLANDO SENTINEL, June 19, 1998, at A8 (urging Iran to cooperate in plans leading to reconciliation between the two countries).

Accordingly, this Comment intends to provide a general basis for relevant and practical considerations made when planning such a transaction. Since the stability and background of a region are important to a transnational investment, Section II begins by discussing the extensive economic history between the United States and Iran during the 1960s and 70s,⁶ and the events leading up to the taking of U.S. hostages in the American Embassy in Iran in 1979.⁷ Section II is further divided into two segments: the first discusses the formation of the Iran-U.S. Claims Tribunal created to resolve disputes arising from the events prior and subsequent to the 1979 Hostage Crises,⁸ and the second segment discusses the current state of U.S. and Iran relations as demonstrated through the Iran and Libya Sanctions Act of 1996 (I.L.S.A.) which officially prohibits large scale investments in Iran until 2001.⁹ Section III explains how relations between the U.S. and Iran have improved in recent months,¹⁰ which potentially will result in a surge of investment opportunities in Iran.¹¹ Section IV continues by analyzing the case law of the Iran-U.S. Claims Tribunal as a basis for planning these new transactions in Iran. Section V explains how other factors, including the ability to obtain adequate financing and insurance, are relevant in planning a successful business agreement.¹² Finally, Section VI concludes by offering a brief summary of the practicality of using this large body of case law developed by the Iran-U.S. Claims Tribunal as a basis for drafting international transactions.

6. See *infra* notes 17-25 and accompanying text (describing the extent of U.S. investment in Iran in the 1960s and 1970s).

7. See *infra* notes 26-43 and accompanying text (establishing what circumstances and conditions led up to the taking of the U.S. hostages in the American Embassy in Tehran, Iran).

8. See *infra* notes 51-79 and accompanying text (noting that to resolve the international dispute, the United States and Iran signed the Algiers Accords which contained a provision for establishing the Iran-U.S. Claims Tribunal to settle all disputes between the two countries).

9. See *infra* notes 53-109 and accompanying text (explaining how relations between Iran and the United States remained severed during the duration of the Tribunal and how Congress reacted by enacting a statute purporting to impose sanctions on any natural person or corporation doing business with Iran); see also Margarete McQuaile & Mauren Lorenzetti, *Europe Seeks End to Broader Sanctions Issue*, PLATT'S OILGRAM NEWS, May 19, 1998, at 1 at 1 (noting that I.L.S.A. has a five year sunset legislation with an expiration date on August 5, 2001, unless Congress decides to renew it).

10. See *Clinton Reinforces Albright's Friendly Overture*, *supra* note 5.

11. See Glain, *supra* note 2 (suggesting Iran's need for investment and economic growth may have been the impetus for Iran's attempt to restore economic ties with the West); see also Daniszewski, *supra* note 1, at A6 (delineating how political changes in Iran will potentially encourage foreign businesses to invest in Iran due to Iran's promotion of a less restrictive environment toward foreigners).

12. See *infra* notes 242-98 and accompanying text (describing how Iran was unsuccessful in providing adequate financing and insurance to foreign investors resulting in Sovereign nations being forced to supply it themselves).

II. BACKGROUND

The success of any investment is based primarily upon the stability of the particular market.¹³ It is crucial for a practitioner or investment consultant to be thoroughly familiar with the region where the investment is to take place.¹⁴ This includes the economic and political background of the region, the stability and extent of that country's foreign relations with other governments, and the legal history between the host and foreign nation.¹⁵ These factors taken as a whole may be the initial consideration taken by an investor before proceeding with the transaction. Accordingly, the following section discusses the precarious relationship between the United States and Iran during the past thirty years of history between the two countries.¹⁶

A. Culmination of the American Embassy Hostage Crises

In the 1960s and early 1970s, Iran began a nationwide program supporting economic and military growth.¹⁷ During this process, the Shah Reza Pahlavi of Iran ("Shah"),¹⁸ commissioned the development of Iran's military power by supporting the purchase of large volumes of military equipment.¹⁹ The Shah also endorsed complete renovation of Iran's economic infrastructure by promoting port facilities, road construction projects, new factories, and the purchase of computer equipment to modernize Iranian businesses.²⁰ To fund its new programs and to continue development, Iran actively sought foreign investment from Western countries, with the United States as its primary target investor.²¹ At the same time, Iran sought foreign employees to train, build, and advise Iran on establishing new factories and

13. See RICHARD EISENBERG, *THE MONEY BOOK OF PERSONAL FINANCE* 414 (1996) (suggesting that a historical analysis is highly relevant to a sound investment).

14. See *id.* at 188 (indicating that an attorney hired should be familiar with local customs before commencing a transaction).

15. See *infra* notes 17-109 and accompanying text (discussing the history of Iran during the last three decades and the resultant relationship that history has had on U.S.-Iran relations).

16. See *id.*

17. See BROWER & BRUESCHKE, *supra* note 4, at 3 (explaining Iran's desire to diversify its economy beyond its virtual dependence on oil revenue).

18. See WAYNE MAPP, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981-1991*, at 3 (Gillian M. White ed.) (1993) (implying that the name Shah was the generic title for the ruler of Iran).

19. See BROWER & BRUESCHKE, *supra* note 4, at 3 (describing how the Shah proclaimed Iran to be the region's military power and purchased large volumes of military equipment in efforts toward meeting these assertions).

20. See *id.* (indicating that this renovation, along with military expenditures, were the result of Iran's newly acquired oil revenue).

21. See *id.* (claiming that by the late 1970s expenditures by American Corporations involved in Iran totaled in the billions of dollars); see also MAPP, *supra* note 18, at 3 n.1 (stating that trade between the United States and Iran increased by over 1,500% from 1970 to 1978).

businesses.²² Growth and progress in Iran continued to skyrocket as oil prices increased during the 1973 oil embargo.²³ As a result of Iran's economic growth during the 1960s and early 1970s, over 45,000 Americans conducted business in Iran and were parties to private and government business ventures by 1978.²⁴ As an unforeseen consequence of the Shah's plan for Iranian economic reform, the large foreign population of investors and employees in Iran created disenchantment among large segments of the Iranian population.²⁵

Iranian nationals were discontent with both the large western population in Iran and the fact that the Shah of Iran encouraged foreign investment.²⁶ Fundamental religious groups headed by the Ayatollah Khomeini believed that the foreign population in Iran would corrupt strictly held Islamic beliefs resulting in the moral decay of Iranian society.²⁷ Blaming the Shah for public discontent, the Ayatollah began a movement calling for the expulsion of foreigners from Iran and the redirection of governmental control.²⁸ An Islamic Revolution, beginning in late 1978, ensued to effectuate the Ayatollah's new policy which targeted foreigners in Iran.²⁹ By early 1979, the Shah left Iran with the aid of the United States,³⁰ further inflaming the Revolutionary factions opposed to the Shah's past foreign and economic policies.³¹ At the same time, most business contracts between the United States and Iran were disrupted by either American abandonment³² or Revolutionary compulsion.³³ Foreign nationals conducting business in Iran hastily left the country leaving their businesses and dominion over them behind.³⁴

22. See BROWER & BRUESCHKE, *supra* note 4, at 4.

23. See *id.* (detailing the fact that in 1973 the price of oil quadrupled which Iran duly utilized to fund the development of its country).

24. See MAPP, *supra* note 18, at 3 (discussing that these included American military advisors, engineers and advisory personnel and their families).

25. See BROWER & BRUESCHKE, *supra* note 4, at 4 (suggesting that, primarily, religious fundamentalists were opposed to the foreign presence in Iran).

26. See *id.*

27. See *id.* (suggesting that religious leaders believed that American economic and military influence in Iran was the source of the Shah's power and the root of the Iranian cultural difficulties).

28. See MAPP, *supra* note 18, at 3 (noting that the Shah was believed to be to blame for the relationship between the Imperial Iranian government and the United States).

29. See BROWER & BRUESCHKE, *supra* note 4, at 4; see also MAPP, *supra* note 18, at 3 (setting forth that only 2,000 Americans remained in Iran by January 1979 as a result of the hostility directed against them).

30. See BROWER & BRUESCHKE, *supra* note 4, at 4 n.2 (indicating that America provided passage to the Shah purportedly for the purpose of dire medical treatment).

31. See MAPP, *supra* note 18, at 5 (describing the detention of personnel from the United States Embassy).

32. See BROWER & BRUESCHKE, *supra* note 4, at 4 (explaining that during the culmination of the revolution many American business personnel left Iran voluntarily).

33. See MAPP, *supra* note 18, at 3 (maintaining that several of the departing Americans were compelled to abandon their businesses and property by the newly formed Revolutionary Guards).

34. See BROWER & BRUESCHKE, *supra* note 4, at 4.

Immediately following the foreign nationals' departure from Iran, U.S. companies attempted to negotiate with Iran's new government³⁵ aiming to collect payment for past contractual performance.³⁶ After negotiations with Iran generally failed, many U.S. businesses attempted, albeit unsuccessfully, to collect payment for contractual performance from Iran by filing actions for breach of contract in U.S. courts.³⁷ It was the goal of these companies to obtain judgments in U.S. courts and levy Iranian assets which were already being held in U.S. banks.³⁸ Additionally, several of the claimants were allowed pre-judgement attachments of Iranian property located in the United States³⁹ However, prior to judgement, all claims filed in the United States were dismissed by an Executive Order from President Jimmy Carter.⁴⁰

For the next several months, hostilities between Iran and the United States continued to rise.⁴¹ On November 4, 1979, in protest of U.S. facilitation of the Shah's departure from Iran, Iranian militants entered the U.S. embassy in Tehran, Iran and took sixty-one U.S. diplomats hostage, as well as diplomats from other countries.⁴² Iranian militants demanded that the United States return the Shah to Iran, along with his assets, so that they could deal with him accordingly.⁴³ As the hostage crises continued and after Iran publicly proclaimed that they would withdraw all Iranian funds from U.S. banks, President Carter ordered Iranian assets frozen in U.S. banks.⁴⁴ Over \$12 billion in Iranian assets held in U.S. banks were

35. See *id.* (stating that Iran's new government was declared by the Islamic Revolutionaries to be called the Islamic Republic of Iran).

36. See *id.*

37. See MAPP, *supra* note 18, at 5 (specifying that all claims were dismissed once the United States provided for an alternate forum for dispute resolution through the Iran-U.S. Claims Tribunal established pursuant to the Algiers Accords).

38. See *Dames & Moore v. Regan*, 453 U.S. 654, 655 (1981) (detailing how claimants contended that they were entitled to just compensation for their claims under the Fifth Amendment).

39. See *Electronic Data Systems v. Social Security Organization of Iran*, 651 F.2d 1007 (5th Cir. 1981) and *Behring International Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.C.N.J.) (1979) (finding in two cases where the court held that a prejudgement attachment was constitutional). But see *Reading & Bates Corporation v. National Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979) (holding that prejudgement attachment was barred because of Iran's sovereign immunity).

40. See *Dames & Moore*, 453 U.S. at 655 (holding that if settlement or suspension of claims are necessary and incident to the resolution of a major foreign dispute and Congress had implicitly acquiesced in that type of Presidential action, then the action will be deemed to be within Presidential authority); see also MAPP, *supra* note 18, at 5 (indicating that when the hostage crises was resolved, all U.S. courts actions were dismissed pursuant to Executive Order No. 12294).

41. See BROWER & BRUESCHKE, *supra* note 4, at 4 (describing public discontent aimed at foreigners present in Iran, especially Americans).

42. See MAPP, *supra* note 18, at 5 (detailing how Iranian militants took sixty-one U.S. Diplomats hostage, as well as, the senior U.S. official in Iran, the Charge d' Affaires, and two other foreign diplomats).

43. See BROWER & BRUESCHKE, *supra* note 4, at 4.

44. See *id.* at 4-5 (relating Iran's intention to withdraw its funds from U.S. banks and to repudiate all financial obligations to U.S. Nationals); see also MAPP, *supra* note 18, at 6 (suggesting that Iran desired to damage U.S. financial interests by withdrawing its assets from U.S. Banks, as indicated by then Iranian Foreign Minister, Mr. Banisadr).

affected.⁴⁵ Incident to the President's order, U.S. courts were directed not to enter any judgments against Iranian property or assets until the hostage crises was resolved and the hostages were safely returned to the United States⁴⁶

To effectuate this policy, the Iranian Assets Control Regulations⁴⁷ were promulgated under the International Economic Powers Act to give Congressional authority to the President's executive power.⁴⁸ Several months later, and after a failed rescue attempt,⁴⁹ Iran and the United States negotiated for the release of the hostages in exchange for release of Iranian assets.⁵⁰ After the crises ended on January 19, 1981, the United States and Iran signed the Algiers Accords which included a provision for the establishment of the Iran-U.S. Claims Tribunal.⁵¹ Central to the Algiers Accords was a preamble that recognized the inability of the United States and the Iranian government to amicably deal directly with one another and a covenant to resolve their differences in good faith through the Tribunal.⁵²

B. The Creation of the Iran-U.S. Claims Tribunal

To accomplish the objectives underlying the Algiers Accords, the Iran-U.S. Claims Tribunal was created to hear both inter-governmental and private party-state claims that arose prior to January 1981.⁵³ Once the Algiers Accords was signed and ratified by the United States and Iran, US\$8.1 billion held by U.S. banks was transferred to Iranian escrow accounts.⁵⁴ These funds were then transferred by Algerian escrow agents to U.S. accounts in order to repay Iranian loans made by

45. See Paul G. Gaston, *Iran-United States Litigation*, 77 AM. SOC'Y INT'L L. 3 (1983) (stating that prior to the revolution, Iran had over \$12 billion assets in U.S. owned banks).

46. See 31 C.F.R. § 535.504 (b)(1) (1980); see also BROWER & BRUESCHKE, *supra* note 4, at 6 (indicating that United States Department of Justice also requested that no action be taken pending resolution of the hostage crises).

47. See *id.*

48. See BROWER & BRUESCHKE, *supra* note 4, at 5 n.5 (citing International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. § 1701) (Supp. III 1979)).

49. See MAPP, *supra* note 18, at 10 (addressing the military efforts to free the hostages involving several aircraft, helicopters, and over one-hundred military personnel).

50. See *id.* at 12 (indicating that Iranian Parliament established the Majlis resolution, which provided that the American Hostages would only be released as a result of lifting of the freeze on Iranian assets, as well as other conditions).

51. See *id.* at 14 (explaining how the Algiers Accord was established to resolve all claims between the United States and Iran and to attempt to restore relations between the two countries to a condition prior to that of the revolution).

52. See *id.* at 14-15 (citing General Principal B of the General Declaration suggesting that the United States would not interfere in Iran's internal affairs).

53. See MAPP, *supra* note 18, at 14 (establishing the role of the Tribunal to resolve all major legal problems arising from contractual or property disputes between the United States and Iran occurring as a result of the Islamic Revolution).

54. See BROWER & BRUESCHKE, *supra* note 4, at 7-8 n.19 (adding that other assets were released subsequently to Iran).

U.S. banks.⁵⁵ Of the remaining assets held, US\$1 billion was kept in U.S. banks in a special security account as a fund for payments for Americans' successful claims as determined by the Tribunal.⁵⁶ The remaining funds needed to settle the claims were placed into the security account by Iran, with all interest accruing on the account continuing to be Iranian property.⁵⁷

The Tribunal, which hears these claims consists of nine members.⁵⁸ The nine members are organized into three chambers of three arbitrators, each with an Iranian, American, and a Swedish or French party as a panel member.⁵⁹ The Tribunal Claims Settlement Declaration provides that the United Nations Commission for International Trade Law (UNCITRAL) rules of procedure shall govern the claims unless modified by either the United States and Iran, or by the entire panel.⁶⁰ The UNCITRAL rules are the culmination of over forty years of attempts by the United Nations to produce an international set of rules of arbitration.⁶¹ These rules are intended to bring about the settlement and termination of all claims through binding arbitration between parties from Iran and the United States⁶²

Many of the Tribunal's interpretations of UNCITRAL have resulted in improvements or clarifications of UNCITRAL, which would have taken the International Community several decades to elucidate in the normal course of commercial arbitration.⁶³ The revisions to UNCITRAL include such broad areas as evidence, hearings, applicable law, representation, and mechanisms for final

55. See *id.* at 5 n.5 (citing P.D. TROOBOFF, IMPLEMENTATION OF THE IRANIAN SETTLEMENT AGREEMENT-STATUS, ISSUES, AND LESSONS: VIEW FROM THE PRIVATE SECTOR'S PERSPECTIVE IN PRIVATE INVESTORS ABROAD PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 114-15) (M.L. Landwehr, ed. 1981) (explaining how US\$5.5 billion was transferred to the Central Bank of Algiers of which US\$3.7 billion was later transferred to the Federal Reserve Bank of New York).

56. See BROWER & BRUESCHKE, *supra* note 4, at 8 (stating that the US\$1 billion was not a maximum limit but would be replenished by Iran as needed to cover American awards).

57. See *id.* (proclaiming that the assets were to be applied toward Iranian liability as determined by the Tribunal).

58. See *id.* at 10.

59. See *id.* (emphasizing that the Claims Settlement Declaration does not mandate that the third panel member be from a country other than the United States or Iran, however, all such members have been from a third country).

60. See *id.* at 17 (discussing that minor modifications were made in establishing the Final Tribunal Rules of Procedure); see also MAPP, *supra* note 18, at 29.

61. See MAPP, *supra* note 18, at 42 (stating how UNCITRAL rules were finally promulgated in 1976 by the United Nations).

62. See BROWER & BRUESCHKE, *supra* note 4, at 8 (outlining that the general purpose of the Tribunal was to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration).

63. See Caron, *supra* note 4, at 156 n.3 (citing HOWARD M. HOLZMANN, SOME LESSONS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL IN PRIVATE INVESTORS ABROAD-PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS (L.M. Landwehr, ed. 1988) (postulating that the Iran-U.S. Claims Tribunal has interpreted, applied, and supplemented the UNCITRAL rules).

awards.⁶⁴ As a result, the UNCITRAL rules, as a model code for commercial arbitration procedure, have gained greater acceptance in conducting international acceptance.⁶⁵

Despite the application of the UNCITRAL rules and the goal to resolve all disputes quickly, the Tribunal could not hear any case unless the Tribunal first acquired jurisdiction over the parties and their claims.⁶⁶ Each party heard before the Tribunal has the burden to allege and establish the Tribunal's jurisdiction over that party.⁶⁷ Parties with dual nationality of Iranian and U.S. citizenship are not considered by Iran to be under the jurisdiction of the Tribunal unless the party's dominant nationality was U.S. prior to January 1981.⁶⁸ The Tribunal also requires that corporate nationality be established by having at least fifty percent of shareholders be of U.S. citizenship.⁶⁹ Parties who are Iranian nationals alone cannot bring a claim before the Tribunal, but may use other mediums and local courts to resolve their disputes against the Iranian government.⁷⁰

In addition to establishing personal jurisdiction, the Tribunal requires that claimants establish subject matter jurisdiction.⁷¹ The Tribunal will only hear claims that arise out of debts, contracts, expropriations or other measures affecting property rights.⁷² Claims for morality violations, mental anguish, pain and suffering, and personal injury⁷³ fall outside the subject matter jurisdiction of the Tribunal.⁷⁴ The Tribunal has also made clear that counterclaims are within the jurisdiction of the Tribunal as long as the claim arose from the same transaction or occurrence of the original national's claim.⁷⁵ The Tribunal requires that to be heard, despite establishing personal or subject matter jurisdiction, outstanding claims must be filed

64. See BROWER & BRUESCHKE, *supra* note 4, at 19 (outlining the expansive body of Tribunal case law developing application of UNCITRAL procedure).

65. See *id.*

66. See MAPP, *supra* note 18, at 14 (indicating that the Tribunal cannot hear a claim from anyone who is not either an Iranian or American citizen).

67. See BROWER & BRUESCHKE, *supra* note 4, at 29 (detailing the Tribunal's inability to hear any claim if the claimant had not yet established jurisdiction).

68. See *id.* at 32 (consideration of dominant nationality involves "all relevant factors including habitual residence, center of interests, family ties, participation in public life and other evidence of association to a country or region").

69. See *id.* at 42.

70. See *id.* at 32.

71. Claims Settlement Declaration, art. II, para. 1, 1 Iran-U.S. Cl. Trib. Rep., at 9; see also Claims Settlement Declaration, art. III, para. 4, 1 Iran-U.S. Cl. Trib. Rep., at 10.

72. See MAPP, *supra* note 18, at 114 (clarifying that the terms of "other measures affecting property rights" has been used by the Tribunal to grant jurisdiction when no other theories of recovery are available).

73. See *Futura Trading Incorporated v. National Iranian Oil Company*, 13 Iran-U.S. Cl. Trib. Rep. 99, at ¶ 64 (1986) (stating that considerations of morality are outside the scope of the Tribunal).

74. See BROWER & BRUESCHKE, *supra* note 4, at 59-60 (concluding that other measures shall be interpreted in the context of contracts and debts only).

75. See *id.* at 99.

prior to January 19, 1982, one year from the date that the Tribunal was formed.⁷⁶ Debts arising prior to January 19, 1981, whether or not demanded after that date, are considered outstanding debts by the Tribunal.⁷⁷ Despite the thousands of cases heard by the Tribunal in its attempts to amicably resolve disputes between the United States and Iran, diplomatic relations between the two countries remained strained.⁷⁸ The next decade, following the formation of the Tribunal, was filled with mistrust, suspicion, and animosity between the two countries.⁷⁹

C. Iran and Libya Sanctions Act of 1996

On August 5, 1996, Congress enacted the Iran and Libya Sanctions Act of 1996 (I.L.S.A.).⁸⁰ I.L.S.A. authorizes the President to sanction any natural person or business entity that invests an aggregate of US\$40 million or more in either Libya or Iran, or US\$10 million within a twelve month period, if that investment contributes to the development of that country's petroleum resources.⁸¹ Additionally, I.L.S.A. has accorded the President with authority to further reduce the total investment to US\$5 million in any year, with an aggregate total investment of US\$20 million.⁸² I.L.S.A. expressly prohibits foreign investment of goods, services, and technology, as well as military supplies and oil refining equipment.⁸³ Congress enacted I.L.S.A. based on its belief that Iran and Libya were the largest supporters of international terrorism which threatened national and foreign security

76. *Id.* at 86 (discussing that no claim could be filed six months after the President was appointed or one year from the establishment of the Tribunal). *But see id.* at 86 n.386 (citing Claim of United Technologies International Inc. 21 Iran-U.S. Cl. Trib. Rep. 5 (detailing how a claimant was allowed to amend a claim after the deadline date with a timely, previously filed claim)).

77. *Merrill Lynch & Co., Inc v. Government of the Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. Rep. 122, at ¶ 31 (1991) (finding jurisdiction over a debt arising in 1975 even though a claim was not made until after January 19, 1981).

78. *See BROWER & BRUESCHKE, supra* note 4, at 19 (relations between Iran and the United States remained severed throughout the history of the Tribunal).

79. *See id.*

80. *See Iran and Libya Sanctions Act of 1996*, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C.A. § 1701) (West Supp. 1997).

81. *See id.* §§ 5(a), (b)(2); *see also* Michael A. Asaro, *The Iran and Libya Sanctions Act of 1996 A Thorn in the Side of World Trading*, 23 BROOKLYN J. INT'L L. 505, 506 (1997) (implying that all investments will be used to develop petroleum resources in Iran and Libya, which will in turn be used to fund extremist groups in these countries, ultimately leading to international terrorism).

82. *See* Marc C. Herbert, *Unilateralism as a Defense Mechanism: An Overview of the Iran and Libyan Sanctions Act of 1996*, 5 Y.B. INT'L L. 1, 6 (1996-97) (stating that the President must request that Congress impose further restrictions on Iran if it is found that Iran is still obtaining sufficient funds to support international terrorism). *But see* 50 U.S.C.A. § 1701 (indicating that the President may grant a waiver of sanctions to any national of any country if that party has agreed to take substantial measures toward suppressing Iran's ability to support weapons of mass destruction and international terrorism).

83. *See* 50 U.S.C.A. § 1701, 2(2), 5(b)(1). *But see id.* (explaining that, in some respects, Iran and Libya are treated differently under I.L.S.A. due to their distinct economic histories).

interests.⁸⁴ By restricting investment in Iran, Congress intimated that Iran and Libya would be denied the ability to develop petroleum resources which would, in turn, further constrain their ability to support acts of international terrorism.⁸⁵

Congress' goal to curb investment in Iran pursuant to I.L.S.A. did not stop at U.S. boundaries.⁸⁶ Rather, Congress had expectations of preventing all European and Asian investment in Iran by threatening financial penalties and sanctions on foreign investors doing business with Iran.⁸⁷ The immediate response from the international community was one of outrage espousing that hegemonic dictations over their sovereign nations would not be tolerated.⁸⁸ Several members of the European Union (EU), including, Italy, Germany, and France further condemned I.L.S.A. as a primary boycott against Iran and Libya, and a secondary boycott against the EU.⁸⁹ The realization that Iran was a primary arena for investment led many European and Asian companies to flock to Iran despite threats governed by I.L.S.A.⁹⁰ Within months after I.L.S.A. was enacted, several foreign businesses entered into various transactions with Iran in clear defiance of the U.S. threatened sanctions.⁹¹ The United States circuitously responded by affirming their commitment to I.L.S.A. while still declining to impose sanctions because of their

84. See Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 WASH. & LEE L. REV. 1601 (1997) (suggesting that the justification for the enactment of I.L.S.A. was rooted in U.S. security interest because of U.S. belief that it was a prime target of international terrorism).

85. See Alexander, *supra* note 84, at 1612 n.67 (citing H.R. Rep. No. 104-523 (1996) and explaining that Congress believed that the Act would decrease currency resulting in Iranian inability to repay its national debt).

86. See 110 Stat. 1551 § 14 (A)-(C) (outlining how I.L.S.A. broadly applies to any natural person, corporation, business association, societies, trusts, or non-governmental business entity). Any natural person under the Act includes both foreign and U.S. nationals. *Id.*

87. See Alexander, *supra* note 84, at 1602 (postulating that Congress may have exceeded its jurisdiction by proposing to impose sanctions on other nations).

88. See Anwar Faruqi, *Allies Ignoring U.S. Sanctions Against Iran: Saudis To Attend Tehran Conference*, THE SEATTLE TIMES, Dec. 7, 1997, at A10; see also *E.U. Mending Diplomatic Fences With Tehran*, HINDU, July 23, 1998 (declaring that foreign critics of I.L.S.A. condemned the U.S. position of asserting dominance over other sovereign countries); see also Cook Warning on Iran Rift, FIN. T., Jan. 16, 1998, at 3 (London) (declaring that U.K. foreign secretary, Robin Cook, suggested that the United Kingdom and the EU could not cooperate with U.S. policy on Iran under the threat of a sanctions gun).

89. *E.U., U.S. Disagree on Iranian Sanctions*, DEUTSCHE PRESSEE-AGENTUR, Jan. 15, 1998 (declaring that EU could not support U.S. policies on Iran while being compelled by sanctions); see also *E.U. Mending Diplomatic Fences With Tehran*, *supra* note 88 (claiming that EU was critical of U.S. efforts to isolate Iran and exercise dominion over 15 EU countries and Russia); see also Asaro, *supra* note 81 at 507, n.22 (distinguishing between primary and secondary boycott).

90. See Faruqi, *supra* note 88 (meeting on December 9, 1997 of leaders from Muslim nations in Tehran was the largest gathering of heads of state in Iran's history, both before and after the revolution); see also *U.S. Isolated in Policy of Trying to Isolate Iran*, PEORIA JOURNAL STAR, Dec. 7, 1997, at A4 (declaring that as the second largest holder of world oil reserves, Iran's oil wealth could not be ignored); see also *Thai FM Visits Iran for Trade Talks*, AGENCE FRANCE-PRESSE, Nov. 20, 1998 (indicating Thai government considered improving trade relations with Iran by engaging in the trade of oil, gas, food and industry goods).

91. See McQuaile & Lorenzetti, *supra* note 9 (stating several oil companies, including Shell, BP, and Conoco entered talks with Iran concerning oil deals); see also *U.S. Isolated in Policy of Trying to Isolate Iran*, *supra* note 90 (proclaiming that investments include a US\$20 billion natural gas deal signed by Turkey and a US\$2 billion dollar Russian & Malaysian partnership with Iran).

finding that the transactions in question did not violate the letter of the I.L.S.A. statute.⁹²

Other countries, such as Canada and China, followed in disregard for the threat of sanctions made pursuant to I.L.S.A. and invested well over the US\$40 million limit in Iran.⁹³ The U.S. eventually reacted to this outright defiance of I.L.S.A. by imposing sanctions against those foreign businesses investing in Iran.⁹⁴ Realizing that the general consensus of I.L.S.A. was unpopular with the international community, the U.S. carefully reconsidered its position.⁹⁵ The U.S. took into account the perspectives of EU and Asian companies which were not indifferent to the U.S. objectives of assuaging international terrorism, but were rather predicated upon their dependence on Iranian petroleum products.⁹⁶

Competition between world markets, caused by the dwindling levels of natural resources, left the United States out in the cold of foreign trade with Iran.⁹⁷ With Europe and Asia dominating the Iranian market, combined with the fear of increased competition with these regions, the United States abated its policy to enforce I.L.S.A.⁹⁸ Inevitably, the United States yielded to diplomatic pressure from

92. See *Albright Stays Firm on Iran*, FIN. T. Jan. 16, 1998, at 4 (London) (stating U.S. Secretary of State, Madeline Albright warned that I.L.S.A. is American law that the U.S. was prepared to enforce); see also *U.S. Isolated in Policy of Trying to Isolate Iran*, *supra* note 90 (explaining how U.S. determined that the agreement designed to transport natural gas to Western markets was technically not violative of I.L.S.A.).

93. See *Middle East Economic Briefs*, XINHUA EN. N., Nov. 21, 1998 (finding that China and Iran traded US\$1.38 billion in 1997, including Iranian exports to China of oil and minerals, and exports from China to Iran of electronic equipment, fabrics, and metals); see also Asaro, *supra* note 81, at 509 (stating that Canada invested US\$212 million to develop oil fields in Iran in clear defiance of I.L.S.A.).

94. See Angus Mackinnon, *E.U. Resumes Ministerial Contacts With Iran*, AGENCE-FR.-PRESSE, Feb. 23, 1998 (indicating that the U.S. had expectations of imposing sanctions on oil companies Total, Russia's Gazprom and Malaysia's Petronas for participating in developing off shore Iranian oil field). But see McQuaile & Lorenzetti, *supra* note 9 (stating sanctions were later lifted).

95. See *Iran: U.S. Eases Rules on Petrochem Deals*, MID. E. ECON. DIG. Nov. 20, 1998, at 12 (establishing that the Clinton administration would relax some of its sanction rules imposed on Iran as a goodwill gesture toward Iranian President Khatami because the U.S. desired to improve bilateral relations with Iran). The U.S. removed the requirement that the sale of certain petrochemical goods and transactions were to be reported to the Treasury Department. *Id.*

96. See *E.U., U.S. Disagree on Iranian Sanctions*, *supra* note 89 (stating that EU isolating Iran economically would not restrict Iran's ability to acquire weapons of mass destruction); see also *Albright Stays Firm on Iran*, *supra* note 92 (specifying that EU proposals for a tougher stance on Iran were promising).

97. See Lee Hamilton, *U.S. Goals in the Gulf Current Policy Isn't Sustainable and Should be Changed*, CHRISTIAN SCIENCE MONITOR, Dec. 24, 1997, at 18 (declaring that the U.S. has vital interests in the Persian gulf including access to energy resources at competitive prices); see also *U.S. Isolated in Policy of Trying to Isolate Iran*, *supra* note 90 (indicating that there was internal pressure on the U.S. government from 440 American companies lobbying for a lifting of economic sanctions against Iran).

98. See Hamilton, *supra* note 97 (postulating that U.S. inability to acquire oil at competitive prices may result in an economic advantage to regional allies). But see *Albright Stays Firm on Iran*, *supra* note 92 (threatening that U.S. imposition of sanctions on France/Russia for an Iranian gas contract was a very real possibility).

the EU and waived sanctions against French, Russian, and Malaysian companies involved in a US\$2 billion energy agreement with Iran.⁹⁹

Despite these limited investment transactions in Iran, I.L.S.A. restrictions greatly diminished economic growth and development within the country.¹⁰⁰ Although opposed to I.L.S.A.'s sanction policy, European investment in Iran has been inhibited due to the Europeans' desire to maintain amicable U.S. relations while still fulfilling its petroleum requirements.¹⁰¹ When foreign investments in Iran declined, Iran's primary export of petroleum products decreased, ultimately contributing to an inhibition of Iran's economy.¹⁰² Furthermore, the stringent prohibitions on investment led to a decline in not only the production of petroleum, but that of other goods and services as well.¹⁰³ The end result has been the crippling of Iran's economy, leaving only scant resources for the basic human needs of Iranian nationals, with none remaining for terrorist support.¹⁰⁴

Despite this economic depression,¹⁰⁵ the Iranians are optimistic that their economy will begin to recover as foreign investments in Iran steadily increase.¹⁰⁶ Even though the apparent erosion of I.L.S.A., in regards to European and Asian transactions with Iran, has created a new atmosphere between Iran and Europe, U.S. relations with Iran remained strained.¹⁰⁷ Iran ultimately realized that due to U.S. influence on other nations, and the fact that the United States had been the primary investor in Iran prior to the revolution, U.S. support was needed to revitalize Iranian

99. Douglas Jehl, *Iran Smiles After U.S. Waives Sanctions Against 3 Companies*, N. Y. TIMES, May 20, 1998, at A13; see also McQuaile & Lorenzetti, *supra* note 9, at 1 (announcing that the United States would not impose sanctions against oil companies Total, Petronas, and Gazprom for their US\$2 billion investment in Iran).

100. See Alexander, *supra* note 84, at 1612 n. 67 (citing H.R. REP. NO.104-523) (stating that without foreign investment, production of Iran's oil and gas revenue will fall, thereby diminishing Iran's national economic resources).

101. See McQuaile & Lorenzetti, *supra* note 9, at 1 (propounding the idea that businesses were now less restrained by I.L.S.A. to invest in Iran after the U.S. waived sanctions against three oil manufacturers).

102. See *Middle East Economic Briefs*, *supra* note 93 (stating that despite foreign investment in Iran, foreign debt has only been reduced from US\$23 billion to US\$19.5 billion from 1995 to 1997, respectively).

103. See Stephen J. Glain, *supra* note 2 (depicting Iran's current need for goods and services despite some investment in Iran).

104. See Alexander, *supra* note 84, at 1612 n.67 (hypothesizing that U.S. policy in enacting I.L.S.A., which was to reduce petroleum resources and limit Iran's ability to repay foreign debt has been successful); see also Asaro, *supra* note 77 (emphasizing that petroleum is Iran's primary source of revenue which when reduced affects Iran's ability to sustain other forms of national business operations).

105. See Pearl, *supra* note 1 (indicating that growth in early 1998 was expected to be 3% while inflation was 20%). Over 500,000 more Iranian citizens will be employed than in the previous year. *Id.*; see also *Iran: Relief on Debts Sought, Despite Fall in Value*, MID. E. ECON. D., Nov. 20, 1998, at 11 (proclaiming that Iran's financial problems were due in part to Iran's partial payment of foreign creditors and missed installment payments).

106. See Daniszewski, *supra* note 1 (reiterating that the Iranian people are hopeful that their President will improve the economy while bringing more freedom to its citizens).

107. See *Albright Stays Firm on Iran*, *supra* note 92 (emphasizing that the United States is still unwilling to fully support Iran because of its firm belief that Iran is a major contributor of weapons of mass destruction and international terrorism)

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economy.¹⁰⁸ To remedy this problem, Iran decided it was time to restore relations with the United States and resume prior political and economic ties between Iran and the United States.¹⁰⁹

III. A NEW ERA OF U.S.-IRANIAN RELATIONS

As a demonstration of Iran's change in policy toward the United States, Iranian President Muhammad Khatami made a revelatory statement on Cable News Network (CNN) asking for cultural exchanges between the United States and Iran.¹¹⁰ President Khatami stated that an exchange of scholars, artists, writers, and tourists between Iran and the United States could begin to break the cultural and economic barriers between the two countries.¹¹¹ Mr. Khatami's pronouncement to the West was met with mixed reaction from both Iranian and foreign sources.¹¹² Although still optimistic, President Khatami was critical of U.S. policy on Iran in the past and warned that both sides would be wary and distrustful in establishing new ties in the future.¹¹³ He suggested that Iran desired a relationship with the United States based on justice and mutual respect, rather than upon their past misgivings.¹¹⁴

108. See *Iran's President Khatami Calls for Investment by the U.S.*, WALL ST. J., Sept. 23, 1998, at A19 (appealing to the U.S. government, President Khatami asked the United States to resume investments with Iran). However, during the same sitting Khatami emphasized that Iran could get by without the United States, if the United States would not reciprocate in exchanges with Iran. *Id.*

109. See *id.* (referring to Khatami's announcement to United Nations General Assembly asking for better Western relations with Iran).

110. See also *Iranian MP Sets Conditions on Normalization of Relations*, XINHUA EN. N., Jan. 3, 1998 (stating that prior to Mr. Khatami's Jan. 7, 1998 announcement was a general proclamation on Dec. 7, 1997 voicing Iran's willingness to begin a dialogue with America). But see George Gedda, *U.S. to Consider Offer of Cultural Exchanges*, ASS'D PRESS, Jan. 8, 1998, (indicating that President Clinton's stated that cultural exchanges are not a substitute for inter-governmental dialogue between the United States and Iran).

111. See *A Softer Iran Gets Attention: U.S. to Take Serious Look at Proposals*, TULSA WORLD, Jan. 9, 1998, at 9 [hereinafter *A Softer Iran Gets Attention*] (detailing how President Khatami told CNN that exchanges would create a "crack in the wall of mistrust" between the United States and Iran). Hashemi Rafsanjani, Khatami's predecessor, stated that Iran is more interested in resuming economic rather than political ties with America. *Id.*; see also Eric Margolis, *Iran's Overtures Should Be Answered Likewise*, ARAB. AM. N., Jan. 23, 1998, at 7 (discussing Khatami's rendition of the bitter history between the United States and Iran, after which he cautiously extended an offer of peace to the West).

112. See *A Softer Iran Gets Attention*, *supra* note 111 (referring to U.S. State Department spokesman, James Rubin, who stated that the United States was open to Khatami's offer but still required Iran to alter its policy toward terrorism); see also Daniszewski, *supra* note 1 (stating that many Iranian youth wanted cultural exchanges with the United States so that they could have more personal autonomy and less government restrictions). Iranian conservatives were critical of Khatami's offer to the West and emphasized that Iran should have focused on its internal economic problems instead. *Id.*; see also Pearl, *supra* note 1 (discussing that left wing parties wanted to disburse funds to the poor and re-vamp state industries before reaching out to the West).

113. See *A Softer Iran Gets Attention*, *supra* note 111 (noting the "Wall of Mistrust").

114. See Daniszewski, *supra* note 1 (relaying the general consensus of Iranian youth which was the establishment of a fair relationship between the United States and Iran); see also *Iran: U.S. Overtures Need Action*, NEWSDAY, June 19, 1998, at A23 (stating that Iran wanted President Clinton to know that Iran desired a reconciliation based on mutuality and reciprocity).

Approximately six months after President Khatami appeared on CNN, President Clinton reciprocated Iran's offer by stating that the United States would seek a genuine reconciliation with Iran.¹¹⁵ The U.S. President suggested that the United States and Iran could once again become allies as they had been prior to the 1979 hostage crises.¹¹⁶ However, this offer to Iran was premised on Iran first changing its position in support of international terrorism.¹¹⁷ The U.S. believed that Iran attempted to acquire nuclear technology and other weaponry which could potentially threaten its neighbors.¹¹⁸ Despite these impediments, Iran and the United States understand that their cultural differences and turbulent history would not make reconciliation impossible.¹¹⁹ Ultimately, both countries have expressed their willingness in working toward this goal.¹²⁰

The reconciliation between Iran and the United States comes at a time after Iran's economy felt the strain of the Iran-Iraq war, twenty years of Iran-U.S. Tribunal decisions, and now most recently I.L.S.A.¹²¹ The impact of these events has resulted in low tourism, exorbitant inflation, and a high unemployment rate, making many Iranians desperate for a new policy toward the West.¹²² To counteract Iran's economic stagnation during the last twenty years, President Khatami has altered Iran's foreign policy to include improved relations with U.S. businesses.¹²³

115. See *Clinton Optimistic About Changes in Iran*, FLA. TIMES-UNION, June 19, 1998, at A12 (explaining that President Clinton was exploring what future with Iran might hold); see also *Iran Changes Positive, A Hopeful Clinton Says*, PLAINDEALER 4, June 19, 1998, at 6A (declaring that the United States wants a genuine reconciliation with Iran); see also Robin Wright, *Iran Says U.S. Is Imperiling Move Toward Reconciliation*, L.A. TIMES, May 5, 1998, at A1 (indicating U.S. government was committed to pursuing improved relations with Iran); see also Robert Burns, *Clinton Open to Iran Reconciliation*, AR. REP., June 19, 1998, at A4 (emphasizing that President Clinton wished to support the positive changes exhibited by Iran).

116. See *Clinton: Let's Renew Friendship With Iran*, *supra* note 5 (stating that U.S. relations can be restored after years of isolating the Persian Gulf). But see *Iran Changes Positive, A Hopeful Clinton Says*, *supra* note 115 (establishing that good relations with the United States cannot be restored until the United States renounces the past 50 years of wrong policies against Iran).

117. See *Clinton Optimistic About Changes in Iran*, *supra* note 115 (prefacing new relations with Iran on its change in policy regarding international terrorism and nuclear weapons); see also Wright, *supra* note 115 (relaying that Iran is frustrated because the United States continues to interfere with Iranian internal affairs and to offer poor treatment toward Iranian athletes and visitors coming to the United States.)

118. See Burns, *supra* note 115.

119. See *A Softer Iran Gets Attention*, *supra* note 111.

120. See *id.* (acknowledging Iranian differences but still hopeful for cultural exchanges); see also *Iran: U.S. Overtures Need Action*, *supra* note 114 (claiming that the United States is still optimistic about resuming good relations with Iran); see also *U.S. Seeks Genuine Reconciliation With Iran*, DEUTSCHE PRESSE-AGENTUR, June 18, 1998 (stating that, according to U.S. Secretary of State Madeline Albright, prospects for better relations with Iran must be balanced against Iran's continued support of terrorism).

121. See Pearl, *supra* note 1 (discussing Iran's economic crises including inflation, low exchange rates and budget deficits leading many in Iran desperate for change).

122. See *id.*

123. See Glain, *supra* note 2 (indicating Iran's promotion of a change in policy toward foreign investors within the region).

To accommodate these businesses, Iran has made recent attempts to resume World Bank funding, as well as join the World Trade Organization.¹²⁴

The Iranian President appealed to the United States to encourage business investments in Iran despite the current prohibitions by I.L.S.A.¹²⁵ Mr. Khatami reasoned that U.S. sanctions on investments in Iran are harmful to U.S. companies, as well as to Iran.¹²⁶ To further gage the U.S. commitment toward new relations with Iran, Mr. Khatami asked that American exporters be allowed to sell US\$500 million in grains and sugar to Iran.¹²⁷ During this same period, Atlantic Richfield Oil Company (ARCO) was the first U.S. company to bid on an Iranian oil contract since I.L.S.A. was established in 1996.¹²⁸ Although the U.S. government still has Congressional authority to impose sanctions on ARCO, the likelihood of that occurring is quite low considering U.S. overtures to improve relations with Iran.¹²⁹

Eventually, other businesses and exporters will come to Iran to meet its demand for goods and services.¹³⁰ Many investors have come to realize that as one of the last frontiers for investment and growth, Iran is an ideal marketplace for transnational investments.¹³¹ This trend to investment in Iran will ultimately lead to an abundance of investors bringing more opportunities to Iran.¹³² As investments increase in Iran, the question that must be asked is what law will govern disputes arising between

124. See Pearl, *supra* note 1 (setting forth that Iran sent a team to Washington to establish World Bank funding which was cut off in 1995 as a result of pressure from the United States). At the same time, Iran took the appropriate first steps for joining the World Trade Organization (WTO). *Id.*

125. See *Iran's President Khatami Calls for Investment*, *supra* note 108 (calling for U.S. investment in Iran despite the current I.L.S.A. prohibitions).

126. See *id.* (indicating that President Khatami believed that U.S. investors and industrialists are most harmed by sanctioning U.S. businesses that wish to invest in Iran); see also *Oil & Gas In Iran*, BUS. MID. E., Feb. 6, 1999 (describing how ARCO's CEO criticized I.L.S.A. sanction provisions as a competitive disadvantage to U.S. businesses).

127. See *Grain As Litmus Test*, CHRISTIAN SCIENCE MONITOR, Feb. 5, 1999, at 10 (stating that Iran is attempting to see if the United States has in fact weakened its policy toward I.L.S.A. sanctions). The authors suggested that the request for grain and sugar was a one-time exception to I.L.S.A. *Id.*

128. See *Oil & Gas In Iran*, *supra* note 126 (reporting by Islamic News Agency (IRNA) that Arco is taking advantage of U.S. change in policy of imposing sanctions by making the first bid on an Iranian oil contract since I.L.S.A. was enacted).

129. See *id.* (affirming U.S. ability to impose sanctions on businesses and cautioning that investors must tread carefully when deciding whether to invest in Iran).

130. See *Iran: South Korean and Japanese Firms Submit Refinery Bids*, MID. E. ECON. DIG., Nov. 20, 1998, at 12 (explaining how Iranian Oil Ministry is evaluating five construction bids from Asian and local companies); see also *Petrochemicals in Iran: Catalyst Needed*, MID. E. ECON. DIG., Feb. 6, 1999 (stating that Iran is seeking European and U.S. investors to support its several oil development projects that it has planned for the next few years).

131. See Hamilton, *supra* note 97, at 18 (enumerating the vitally important interests that the U.S. has in the Persian Gulf including access to energy resources at reasonable prices, the security of regional allies, and the prevention of foreign powers gaining control over the region).

132. See *Iran: South Korean and Japanese Firms Submit Refinery Bids*, *supra* note 130 (postulating that as foreign investments increase, Iran will be better able to finance more of its local projects leading to heightened national and foreign business opportunities in Iran).

theses two countries: Iranian or United States?¹³³ This Comment postulates that the Iran-U.S. Claims Tribunal decisions, which are the largest body of international law between the United States and Iran,¹³⁴ will likely weigh heavily in future dispute resolutions and business planning between the two investing entities.¹³⁵ Although not conclusive, a legal practitioner planning a transnational investment with Iran should be familiar with some of the findings and nuances of the Tribunal decisions.¹³⁶

IV. IMPACT OF IRAN-U.S. CLAIMS TRIBUNAL DECISIONS ON IRAN

Since the Tribunal's first meeting on July 1, 1981, the Tribunal has reviewed the thousands of claims presented before it.¹³⁷ Because of its uniqueness and volume, the Tribunal's findings, although not precedential,¹³⁸ give an accurate assessment of the outcome of similarly situated disputes arising in other settings involving international claims adjudication.¹³⁹ A practitioner of international law, who is counseling business entities intending to invest in Iran, must be aware of the far reaching results of the Iran-U.S. Claims Tribunal.¹⁴⁰ Therefore, it is crucial that a practitioner be well informed on what products are needed in Iran,¹⁴¹ the law

133. See generally MAPP, *supra* note 18, preface (referencing the importance of the Iran-U.S. Claims Tribunal and its significance to the United States and Iran).

134. See BROWER & BRUESCHKE, *supra* note 4, at 658 (detailing the magnitude of the Tribunal and its uniqueness regarding U.S. and Iranian dispute resolution). The authors declared the vastness of the Tribunal decisions. *Id.*

135. See Richard B. Lillich and David J. Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 AM. J. INT'L L. 436, 463 (1997) (espousing that interpretations of settlement claims of the Tribunal may be a valuable source of opinions on the law of international claims). *But see* Caron, *supra* note 4, at 104 (suggesting that the Iran-U.S. Claims Tribunal will not be persuasive because of the unique type of arbitration it involves).

136. See BROWER & BRUESCHKE, *supra* note 4, preface (stating that the impressive work of the Tribunal should be available to the resolution of both present disputes and future tribunals).

137. See *id.* at 658 (establishing that as of 1998, the Tribunal has disposed of over 95% of its claims equaling total settlements in the amount US\$2,000,000,000 between Iranian and U.S. nationals); see also Lillich and Bederman, *supra* note 135, at 437 (indicating that the Tribunal had approximately 3,100 small claims presented to it and of those, 578 claims were dismissed, 1,422 were denied, and approximately 1,066 were adjudicated).

138. See BROWER & BRUESCHKE, *supra* note 4, at 669 (claiming that in certain areas involving international law the decisions of the Tribunal are, arguably, persuasive).

139. See Lillich and Bederman, *supra* note 135, at 463 (concluding that interpreting the lump sum settlement claims between the United States and Iran would be a useful source of legal opinion to the international community).

140. *Id.* (proclaiming that the outcome of the Tribunal impacts several areas of international law narrowly).

141. See *infra* notes 145-59 and accompanying text (describing Iran's need for new parts, especially those used in the agriculture and the oil industry).

applying to those products,¹⁴² and the possible interpretation or outcome an international tribunal or arbitrator¹⁴³ may reach based on the applicable law.¹⁴⁴

A. Iran's Need For Spare Parts

The role of the legal practitioner may not stop at the confines of the transnational agreement.¹⁴⁵ In addition to drafting a contract that fulfills the legal needs of an investor, a practitioner may be called upon to give advice on the areas or types of investment most lucrative in Iran.¹⁴⁶ Even though there is a need for all types of trade in Iran, the most immediate one is Iran's requirement for spare parts.¹⁴⁷ In recent years, Iran has demonstrated a shortage of replacement parts of all types,¹⁴⁸ a fact that may be crucial to advising a potential investor in Iran.¹⁴⁹ Since being virtually cut off from Western trade during the last twenty years,¹⁵⁰ Iran has had great difficulty in obtaining spare parts and maintaining its machinery, especially that used in agriculture.¹⁵¹ As Iran's machinery, including tractors, oil equipment, auto parts, and factory tools have aged, the lack of replacement parts has crippled Iran's ability to maintain its foreign and domestic economic interests.¹⁵² To compensate, Iran has had to accept lines of credit from foreign nations in order to

142. See generally GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS* (Kluwer Law and Taxation Publishers) (1994).

143. See Caron, *supra* note 4, at 123 (identifying that international legal disputes may be resolved at the International Court of Justice, by private arbitrations, or in municipal courts).

144. See *infra* 186-237 and accompanying text (presenting several aspects of the Tribunal's decisions which may aid a practitioner in designing a transnational agreement).

145. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) (stating that when acting as an advisor to a client, a lawyer must render independent judgement and render candid advice). If the lawyer knows that the client is planning a course of action that will adversely effect that client, the attorney may offer advice without being asked. *Id.*

146. See *id.* (asserting the notion that a lawyer may give a client not only legal advice, but also moral, economic, social or political advice where that is relevant to the client's situation).

147. See *Iran Set To Raise Production*, AUSTL. NEWS ABSTRACTS, Jan. 18, 1999 (maintaining that Iran wishes to increase revenues by expanding its oil products rates if it can obtain the necessary spare parts to refurbish its oil industry).

148. See Glain, *supra* note 2 (indicating that Iran is in desperate need of all types of spare parts in order to continue operating its aging machinery).

149. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 145 (permitting attorneys the authority to offer unsolicited economic advice to their clients).

150. See BROWER & BRUESCHKE, *supra* note 4, at 19 (explaining that relations between Iran and the United States remained severed ever since the 1979 American Hostage crises); see also James A. Nathan, *Is It Time To Bury The Hatchet With Iran?*, USA TODAY, Jan. 1 1999, at 22 (proclaiming that as a result of I.L.S.A., the United States has been successful in denying Iran spare parts for oil and engineering equipment); see also Pearl, *supra* note 1, at 3 (indicating that Iranian export director is making tour buses using spare parts that were acquired from Mercedes engines).

151. See Glain, *supra* note 2 (indicating that since the 1979 Iranian revolution, farmers have had to compensate for their increasingly aged fleet of 650,000 tractors used for agricultural purposes).

152. See *id.* (examining the harsh reality that Iran's low per capita income of \$US800 has disabled the ability of Iranian nationals to maintain their aging equipment). European and Asian distributors of luxury cars, tractors and tools were disappointed that Iran lacked the ability to purchase new goods. *Id.*

purchase the necessary spare parts required for its oil industry.¹⁵³ Despite these shortcomings, Iran has still been able to attract foreign investors to the region.¹⁵⁴

Astute investors from all over the world are flocking to Iran to meet the new market of millions of potential Iranian customers.¹⁵⁵ Many believe that Iran is one of the largest markets in the world for spare parts because they lack the resources to purchase large volumes of new products.¹⁵⁶ Since funds are limited and the fact that Iran's industrial and farming equipment is aging and deteriorating, some believe that the market for spare parts in Iran has never been greater.¹⁵⁷ As the sale of spare parts in Iran increase, practitioners of international law must be prepared to plan accordingly.¹⁵⁸ These plans should include both the specific provisions for the goods involved in the trade and also other essential aspects of the investment, including provisions for the choice of law or applicable law in the event that a dispute arises between the contracting parties.¹⁵⁹

B. What Law May Govern the New Marketplace

A practitioner must plan carefully when considering the importance and complexity of choice of law provisions which govern a transnational agreement.¹⁶⁰ Generally, four different choice of law issues can arise in international commercial arbitration.¹⁶¹ These include: first, the substantive law that will apply to the merits of the contract;¹⁶² second, the substantive law applying to the arbitration agreement

153. See *Iran Reaches Deal to Reschedule Two Billion Dollars in Foreign Debt*, DEUTSCHE PRESSE-AGENTUR, Feb. 9, 1999 (declaring that French and Italian insurance firms have extended a two and five year line of credit to Iran so that Iran may purchase machinery, spare parts and raw materials).

154. See *Iran: South Korean and Japanese Firms Submit Refinery Bids*, *supra* note 130 (stating that several Asian investors are negotiating Iranian contracts).

155. See *Push For Isolating Iran Lacks Arab, European Support Greensboro*, NEWS & RECORD, Dec. 7, 1997, at A12 (stating that European and Arab investors have gathered in Iran to determine what the future may hold regarding transnational investments with Iran).

156. See Glain, *supra* note 2 (quoting an agent for the Gasket Manufacturing & Trading Co. who claims that Iran is an enormous market for spare parts despite a shortage of foreign currency).

157. See Michael Weiss, *Illegal Trade Charges Against Norcross Company End 3-Year Federal Investigation*, ATLANTA CONST., Dec. 4, 1998, at D1 (stating that there is a dire need for spare parts to replace American-made products, including cars, trucks, and airplanes which are already in Iran).

158. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 145 (claiming that an attorney's responsibility to the client does not merely end with her legal duties).

159. See *infra* notes 186-237 and accompanying text (analyzing the outcome of the Tribunal regarding spare part and contracts generally).

160. See BORN, *supra* note 142, at 24 (explaining that although choice of law provisions are often useful in avoiding litigation, their complexity gives rise to a myriad of other issues).

161. See *infra* notes 162-166 and accompanying text (delineating the four types of conflict of law issues arising in an commercial international agreement).

162. See BORN, *supra* note 142, at 100 (identifying that there are varied rules applied during commercial arbitration based on whether the parties have expressly agreed to the law governing the merits or whether the law must be ascertained in the absence of an express agreement by the contracting parties). Some states will not enforce choice of law agreements if the chosen law is contrary to the public policy of the forum. *Id.* at 121.

itself;¹⁶³ third, the law applying to the arbitration proceedings;¹⁶⁴ and, fourth, the conflict of law rules applied to the selection of foregoing three issues.¹⁶⁵ Planning the appropriate conflict of law provisions could be critical to gaining an advantage in the event of an international claims dispute.¹⁶⁶

Alternatively, the Tribunal took a more simplistic approach when analyzing the law controlling the contract.¹⁶⁷ Upon establishing the Iran-U.S. Claims Tribunal, Iran and the United States agreed that the Tribunal would decide all cases on the basis of "respect for law."¹⁶⁸ This means that both Iran and the United States recognized the limitations of their sovereign authority to adjudicate claims, while acknowledging that their sovereignty is subject to the confines of international law.¹⁶⁹ Thus, although their decisions must be "based on respect for law," the Tribunal is granted broad discretion in choosing the applicable law that they deem appropriate.¹⁷⁰ Initially, this broad discretion of the Tribunal created confusion after some advocated applying the law of the contract while others endorsed the law of the place where the contract was to be performed.¹⁷¹

163. See *id.* at 154 (emphasizing that because an arbitration agreement is so complex, it is often believed to be separable from the underlying contract). This law relating to the arbitration agreement is applicable to the document's validity, effect and interpretation. *Id.*

164. See *id.* at 26 (detailing that the law applying to the arbitration proceedings include procedural issues, the enforceability of the agreement, judicial standards and ethics, to name a few). The law applying to the arbitration proceedings may be the most important choice of law consideration because this law influences almost every aspect of the arbitration, including the scope of discovery and the removal of arbitrators. *Id.*

165. See *id.* at 26 (indicating that the selection of conflict of laws may involve application of the arbitration forum's conflict of law rules, international rules, or the rules of the interested states).

166. See *id.* at 24 (identifying the usefulness of a well-planned conflict of law issues in avoiding some forms of litigation).

167. See BROWER & BRUESCHKE, *supra* note 4, at 640 (stating that the Tribunal has used broad discretion of an indeterminate source when determining choice of law).

168. See Claims Settlement Declaration, *supra* note 71, art. V (explaining that the basis for the "respect for law" provision is a mandate by art. V which states that the Tribunal shall apply "such choice of law rules and principals of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances").

169. See Andreas F. Lowenfeld, *The Jurisprudence of the Iran-U.S. Claims Tribunal*, 92 AM. J. INT'L L. 149 (1998) (reviewing GEORGE H. ALDRICH's book and postulating that the sovereign actions of states over other states and individuals are subject to the restrictions of generally accepted principals of international law).

170. See BROWER & BRUESCHKE, *supra* note 4, at 632-33 (specifying that Article V of the Claims Settlement Declaration does not require the Tribunal to apply any specific system of conflict of laws or any other substantive law when determining the applicable law). The Tribunal has enormous freedom and discretion when resolving a conflict of law issue. *Id.* The broad discretion granted to the Tribunal is based on a case-by-case analysis in order to give the Tribunal the ability to resolve the broad range of cases coming before it. *Id.*

171. See *Oil Fields of Texas v. Iran*, 1 Iran-U.S. Cl. Trib. Rep. 347 (1981-82) (indicating that the Tribunal had to first decide whether to apply Iranian municipal law or that of Texas before they could get to the issue of liability and damages under the contract); see also, Tipton F. McCubbins, *Protecting the Rights of Investors in the International Arena: A Case for Binding Arbitration*, 21 AM. J. TRIAL ADVOC. 523, 534 (1998) (advocating that, in cases of conflict of law, the law of the place where the contract is performed should be applied).

The Tribunal resolved these disputes, overtime, by concluding that the Tribunal would apply the law based on two general categories.¹⁷² The first category, concerning the interpretation of the Algiers Accords itself, involved application of principals of public international and treaty law.¹⁷³ The second category, concerning both private and inter-governmental claims, entails the application of four sources of law.¹⁷⁴ The Tribunal has further divided this latter category into public international law claims and private commercial claims.¹⁷⁵ For public international law claims, either treaty law¹⁷⁶ or customary international law applies.¹⁷⁷ In regards to private commercial claims, the Tribunal has applied the law of the contract as agreed upon by the parties¹⁷⁸ or general principals of commercial law.¹⁷⁹ However, upon analyzing the overall application of general principals of conflict of laws applied by the Tribunal, it becomes apparent that there is no established pattern or rule used by the Tribunal which can be applied in any given case.¹⁸⁰

Despite this uncertainty as to which law will ultimately be applied to an agreement, a practitioner would be prudent to include provisions for conflict of law

172. See BROWER & BRUESCHKE, *supra* note 4, at 633 (stating that the Tribunal's choice of law discretion was broadly designed to address two general categories of issues).

173. See *id.* at 263 (explaining that the Tribunal's approach to treaty law is based on the Vienna Convention on the Law of Treaties which are further based on customary international law applying to treaty interpretation).

174. See *id.* at 633-34 (claiming that all other questions arise under either treaty law, customary international law, the law of the contract as agreed upon by the parties, or general principals of commercial law). *But see* MAPP, *supra* note 18, at 121 (stating that, generally, there are two kinds of laws applied by the Tribunal: firstly, municipal law has been applied to contract disputes between nationals of one country against the government of the other, and secondly, international law has been applied by the United States or Iran, as official claims against the other nations' government arising from a contractual breach).

175. See *infra* notes 176-79 and accompanying text (explaining that the Tribunal's choice of law determinations in various categories have not been uniformly applied).

176. See BROWER & BRUESCHKE, *supra* note 4, at 633 n. 3005 (indicating that this treaty law was based on the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, June 16, 1957, 3 U.S.T. 900).

177. See *Oil Fields of Texas v. Iran*, *supra* note 171 (holding in dicta that the Tribunal has authority to use international law to supplement the applicable municipal law in order to ensure that foreign nationals are not denied justice).

178. See BROWER & BRUESCHKE, *supra* note 4, at 636 (determining that the terms of the contract, although not determinative, have been a starting point for the Tribunal when resolving questions of contract interpretation). *But see* MAPP, *supra* note 18, at 121 (citing *Mobil Oil Iran Inc. v. Government of the Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 3, 27, and stating that the Tribunal does not deem it appropriate that a transaction be governed by the law of one party to the contract).

179. See *DIC of Delaware, Inc. v. Tehran Development Corp.*, 8 Iran-U.S. Cl. Trib. Rep. 144 (1985) (explaining how the Tribunal held that U.S. municipal law must conform to general principals of commercial and international law); see also *Economy Forms Corp. v. Iran*, 3 Iran-U.S. Cl. Trib. Rep. 42 (1983) (concluding that general principals of law applied to a contract predominantly performed in Iowa, U.S.); see also *Anaconda Iran Inc. v. Iran*, 13 Iran-U.S. Cl. Trib. Rep. 199 (1986) (suggesting that in contracts that do not include a choice of law provision, the Tribunal will apply relevant principals of commercial law).

180. See BROWER & BRUESCHKE, *supra* note 4, at 639 (concluding that the Tribunal's lack of attention to detail when applying general principles of conflict of laws has made predicting the outcome of their findings precarious). The uncertainty as to the analysis of conflict of laws by the Tribunal may have been the direct result of an overriding application of general principals of commercial law and *lex mercatoria* by the Tribunal. *Id.*; see also BLACK'S LAW DICTIONARY 911 (6th ed. 1990) (defining *lex mercatoria* as that system of commercial laws which is adopted by all nations, and constitutes a part of the law of the land).

issues in the contract.¹⁸¹ Parties planning on entering business transactions in Iran may wish to include these choice of law clauses in their contract despite the fact that the Tribunal decisions are not binding authority on their transactions.¹⁸² In addition to including the proper choice of law provisions, a practitioner must also be versed on how those provisions may be decided by an arbitrator.¹⁸³ To alleviate the uncertainty, several aspects of the Tribunal's decisions have been analyzed in the following section.¹⁸⁴ Accordingly, the focus in the following segment is on the contract and the law ultimately applied to it by the Tribunal.¹⁸⁵

C. Iran-U.S. Claims Tribunal Outcome on Spare Parts

Since the Tribunal began hearing cases in 1981, it has disposed of over 95% of its caseload.¹⁸⁶ Among the thousands of cases heard before the Tribunal, sixty-one related in some way to claims arising from the sale of spare parts in Iran.¹⁸⁷ Some of these cases were settled prior to coming before the Tribunal and others were dismissed on jurisdictional issues.¹⁸⁸ The remaining cases, which were adjudicated on their merits, will be crucial to dispute avoidance or resolution arising from the sale of spare parts or other goods in Iran.¹⁸⁹ Accordingly, the following three sections will discuss the Tribunal's outcome based on frustration of the parties contractual purpose or force majeure,¹⁹⁰ contractual terms¹⁹¹ and breach of contract.¹⁹²

181. See BORN, *supra* note 142, at 24 (reflecting the opinion that there are benefits to a contract containing well planned choice of law provisions).

182. See BROWER & BRUESCHKE, *supra* note 4, at 655 (postulating that although not binding, the Tribunal decisions may be persuasive nonetheless).

183. See Lillich and Bederman, *supra* note 135, at 463 (concluding that the Tribunal's analysis of the small claims brought before the Tribunal may be relevant to the legal community).

184. See *infra* notes 186-237 and accompanying text (explaining various aspects of the decisions of the Tribunal which may be relevant to an investor in the event a dispute arises).

185. See *id.*

186. See BROWER & BRUESCHKE, *supra* note 4, at 658 (stating that the Tribunal has disposed of 95% of claims submitted to it with every award to an American claimant being paid in full).

187. See *infra* notes 193-234 and accompanying text (analyzing claims based on spare parts which dealt with contractual issues generally present in most transactions).

188. See Lillich and Bederman, *supra* note 135, at 437 (calculating that of the approximately 3,100 presented to the Tribunal, 578 claims were dismissed, 1,422 claims were denied and 1,066 awards were issued to the persons party to the arbitration).

189. See BROWER & BRUESCHKE, *supra* note 4, at 664 (finding that the several volumes of reported decisions have contributed to the largest single body of precedent in public and commercial law). Many Iranian, American and third country arbitrators have come to realize the utility derived from the Tribunal decisions and the uniformity found in the principals of contract formation and interpretation between their countries. *Id.*

190. See *infra* notes 193-204 and accompanying text (describing the Tribunal's analysis of contracts that were interrupted during the height of the Iranian Revolution in late 1978 to early 1979).

191. See *infra* notes 205-16 and accompanying text (explaining that considerable deference was given to the parties contractual terms by the Tribunal).

192. See *infra* notes 217-37 and accompanying text (referring to alternate means of resolving contractual disputes when the cause of the breach was not found to be force majeure related).

1. Force Majeure

It was frequently the contention of a contracting party that the contract between a U.S. party and an Iranian national was frustrated by the Iranian revolution of 1978-79.¹⁹³ This frustration of purpose under a contract was termed "force majeure"¹⁹⁴ or any cause of impossibility beyond the seller's reasonable control, including lockouts, strikes, riots, or wars, that prevent one or both parties from performing under the provisions of the contract.¹⁹⁵ The Tribunal has repeatedly asserted that if force majeure is found,¹⁹⁶ a party is excused from further performance under the contract.¹⁹⁷ However, parties may waive an excuse of performance if their conduct, at the time of the precipitating events, suggested that both parties considered the contract to still be in force.¹⁹⁸ As long as the parties' expectations of continuing the contract were reasonable under the surrounding circumstances, the Tribunal has upheld compensation under the contract.¹⁹⁹

193. See *Sylvania Technical Systems, Inc. v. Iran-U.S.*, 8 Iran Cl. Trib. Rep. 298 (1985) (invoking force majeure in February 1979 to cancel the contract after several invoices went unpaid following the Revolution); see also *Queens Office Tower Associates v. Iran National Airlines Corp.*, 2 Iran-U.S. Cl. Trib. Rep. 247 (1983) (specifying that when force majeure is invoked the Tribunal has ultimate discretion to determine the equity of allowing recovery); see also *International School Services Inc. v. National Iranian Copper Industries Co.*, 9 Iran-U.S. Cl. Trib. Rep. 187 (1985) (proclaiming that losses would often be retained after force majeure has been declared by a contracting party).

194. See *Gould Marketing Inc. v. Ministry of National Defense of Iran*, 3 Iran-U.S. Cl. Trib. Rep. 147 (1983) (defining force majeure as social and economic forces beyond the power of the state to control through the exercise of due diligence). "Injuries caused by the operation at such forces are therefore not attributable to the state for purposes of its responding for damages." *Id.* "As between private parties, one party cannot claim against the other for injuries suffered as a result of delays in or cessation of performance during the time force majeure conditions prevail, unless the existence of these conditions is attributable to the fault of the respondent party." *Id.*

195. See *International Technical Products Corp. v. Islamic Rep. of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 206 (1985) (finding that by December 1978, civil strife had created classical force majeure conditions persisting as late as June 1979 in some cities); see also *Sedco, Inc. v. National Iranian Oil Co.*, 15 Iran-U.S. Cl. Trib. Rep. 23, at ¶ 125 (1983) (striking halting oil drilling was found to be caused by political unrest during September and November 1978).

196. See *General Dynamics Telephone Systems Center v. Islamic Republic of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 153 (1985) (giving weight to the fact that the contract was interrupted during late 1978 and early 1979); see also *Development and Resources Corp. v. Islamic Republic of Iran*, 25 Iran-U.S. Cl. Trib. Rep. 20, at ¶ 63 (1990) (finding force majeure conditions present); see also *Rankin v. Islamic Republic of Iran*, 17 Iran-U.S. Cl. Trib. Rep. 135, at ¶ 39 (1987) (proclaiming force majeure was supported by the facts); see also *Petrolane, Inc., v. Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. Rep. 64, at ¶ 51 (1991) (indicating that interruption of the contract was force majeure).

197. See *International School Services Inc. v. National Iranian Copper Industries Co.*, *supra* note 193 (quoting that after force majeure is found the "loss must lie where it falls").

198. See *Westinghouse Electric Corp. v. Islamic Republic of Iran*, Award No. 579-389-2, at ¶ 59 (1997) (indicating that both parties considered the contracts to be still in force and were anxious to resume performance as conditions in Iran improved). Both parties met after the contract was initially interrupted and discussed how they would resolve all disputes that had arisen during the preceding days. *Id.* at ¶ 40. After coming to an agreement to resume performance of the contract the United States Embassy was seized within three days. *Id.* at ¶ 43.

199. *Id.* at ¶ 61 (specifying that by the end of 1979, the parties must have realized that conditions in Iran were unlikely to change in the foreseeable future so as to continue performance under the contract). The Tribunal determined that suspension of the contract could not be indefinite without affecting the viability of the contract. *Id.*

If force majeure is found, the Tribunal indicated that parties are entitled to payment for partial performance up until the time of excuse of performance occurred under the contract.²⁰⁰ This type of equitable remedy includes only actual costs of performance or advance payments made before the date of termination of the contract, and not compensation for lost profits or fees incurred after the date the contract ended.²⁰¹ To establish the right to compensation under the contract once force majeure is found, the Tribunal often looks to detailed letters, billing statements, or other correspondence which detailed the dates of goods sent and suggests which party may have been at fault in frustrating performance of the contract.²⁰² As a prudent advisor, a transnational practitioner would serve her clients' interest well by indicating that once a contract is formed, a detailed paper trail should be created so that a future tribunal may determine the value of performance due if in fact the contract is found to be frustrated.²⁰³ Another consideration to make in drafting a contract involves the Tribunal's emphasis on terms of the contract established by the parties.²⁰⁴

2. The Weight Given to Terms of the Contract

In determining terms of the contract, the Tribunal often looked to the contract itself and how the parties acted once the contract was formed.²⁰⁵ In one case, the Tribunal found that based on the terms of the contract, a breaching party could

The Tribunal concluded that despite the parties expectations, the contract had been terminated due to prolonged force majeure conditions through the end of 1979. *Id.* But see *Mobil Oil Co. v. Iran*, *supra* note 178, (refusing to terminate a long term contract because conditions were beginning to normalize by March 1979). The Mobil court based its decision on the fact that the contract was long term and had the Iranian government as a party to the agreement. *Id.*

200. See *Levitt v. Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. Rep. 145, at ¶ 75 (1991) (explaining that the consequences of frustration of contract is such that amounts due under the contract are to be proportioned to the extent the contract was performed). If payment has been made, the party which received such payment is entitled to retain that amount of money proportionate to their performance and must return any money in excess of that amount. *Id.*; see also *International School Services Inc.*, at 193 (concluding if no payment has yet been made, the party which has performed is entitled to receive payment to the extent of that performance).

201. See *Levitt* 27 Iran-U.S. Cl. Trib. Rep., at ¶ 75 (disallowing costs incurred after the date the contract was found to be terminated); see also *International School Services Inc.*, 9 Iran-U.S. Trib. Rep., at 187 (reiterating that it was the practice of the Tribunal to withhold compensation for gains not yet realized).

202. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶¶ 94-97 (tracing conversations, letters and correspondence between the contracting parties, the Tribunal declared the right to compensation and the date of actual termination of the contract).

203. See *MAPP*, *supra* note 18, at 127 (citing *Khuzestan Water v. Power Authority*, 3 Iran-U.S. Cl. Trib. Rep. 156 (1983) (indicating that the Tribunal looked to letters, telexes and the conduct of the parties to determine whether the parties believed that they were still performing under a contract or in the absence of one).

204. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 131 (supporting the assertion that the Tribunal gives deference to the terms of the contract).

205. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 86 (deciding that a negotiation agreement reached by the parties was binding as evidenced by the parties behavior both before and after the negotiations took place). The negotiation agreement although not signed by either party, suggested that both parties believed the accuracy of the value of the work performed thus far. *Id.*

terminate the contract if the other party acquiesced in the termination, ultimately resulting in a waiver of a contractual requirement for written notice of termination.²⁰⁶ This Tribunal result suggests that breaching parties are not necessarily penalized for terminating a provision under the contract, as long as they comply with the remaining contractual terms and the other party assents.²⁰⁷ Other cases have clearly indicated that if one party does not reject nonconformance of goods within the period specified within the contract, then that party is considered to have accepted the goods and is responsible for their costs.²⁰⁸ After a party is found to have accepted the nonconforming goods, he has waived his right to assert that the goods are nonconforming at a later time.²⁰⁹ These cases clearly indicate that the Tribunal closely looks to the terms of the contract when deciding what weight to give any party's claim.²¹⁰

Despite finding that a contract has been terminated, the Tribunal will still award a fair and reasonable value for the extent of performance made prior to the date of termination if contractual provisions allow for such awards.²¹¹ It appears from these findings that the Tribunal will strictly honor terms of the contract as long as the party's actions, following the termination of the contract, are not to the contrary.²¹² In assessing value for partial performance or payment due before a contract is terminated, the Tribunal often uses the currency conversion value of the

206. See *Collins Systems International Inc. v. Navy of the Islamic Republic of Iran*, 28 Iran-U.S. Cl. Trib. Rep. 195, at ¶ 137 (1992) (concluding that the absence of objections to contractual requirements are presumed to be correct); see also *Houston Contracting Co. v. National Iranian Oil Co.*, 20 Iran-U.S. Cl. Trib. Rep. 3, 24-25 (1988) (indicating that failure to object results in acquiescence); see also *Westinghouse Electric Corp., Award No. 579-389-2*, at ¶ 86 (proclaiming that because the parties did not comply with written notice under the contract the Tribunal stated the requirement was waived).

207. See *Westinghouse Electric Corp., Award No. 579-389-2*, at ¶ 137 (finding that the Iranian Air Force verbally terminated one of several contracts with Westinghouse and Westinghouse acquiesced in this termination). The Tribunal gave weight to the fact that the writing requirement included within the contract was waived by both parties. *Id.*

208. See *Chas T. Main International, Inc. v. Khucestan Water & Power Authority*, 3 Iran-U.S. Cl. Trib. Rep. 156, 163-64 (1983) (claiming that non-contractual goods and services already accepted will be considered in determining the amount due for claims of breach).

209. See *Austin Co. v. Machine Sazi Arak*, 12 Iran-U.S. Cl. Trib. Rep. 288, at ¶¶ 29-32 (1986) (declaring that failure to complain contemporaneously as the alleged problems arose or thereafter, undermines the credibility of its complaints in the proceeding); see also generally *Harza v. Islamic Republic of Iran*, 11 Iran-U.S. Cl. Trib. Rep. 76 (1986).

210. See *Questech v. Ministry of National Defense*, 9 Iran-U.S. Cl. Trib. Rep. 107 (1985) (claiming that at least initially, the Tribunal should look to the provisions of the contract itself to determine the consequences of a party's claim). But see *United Painting Co. v. Islamic Republic of Iran*, 23 Iran-U.S. Cl. Trib. Rep. 351, at ¶ 49 (1989) (declaring that the Tribunal may use alternate means to determine liability).

211. See *Levitt*, 27 Iran-U.S. Cl. Trib. Rep., at ¶ 118 (holding that no recovery was available under the provisions of the contract, but was established on the basis of the parties performance); see also *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 221 (1987) (indicating that when the circumstances prevent calculation of an exact figure, the Tribunal will use its discretion to ascertain the amounts to be recovered). This includes hiring expert witnesses. *Id.*

212. See generally *Westinghouse Electric Corp., Award No. 579-389-2* ¶¶ 94-97 (analyzing the parties actions surrounding the events of the breach).

performance or payment at the time the contract was negotiated, not at the time the contract was terminated.²¹³ However, if the contract did not stipulate conversion rates, the Tribunal would select the date on which the obligation or debt became due and apply the rate of exchange applicable on that date.²¹⁴ These findings greatly suggest that the Tribunal gives great deference to the contractual terms where no substantial Tribunal discretion is required.²¹⁵ In cases requiring the Tribunal to establish contractual terms, the Tribunal often declares that there is no basis for the decision, resulting in a dismissal of that particular claim.²¹⁶

3. Breach of Contract

In cases involving an interruption of contractual performance, other than through force majeure claims,²¹⁷ the Tribunal often considers whether the parties breached the contract.²¹⁸ The issue of breach often focuses on whether one party's duty to perform ever arose if a condition precedent had not yet occurred.²¹⁹ More specifically, claimants often assert that a breach of contract did not occur because the other party had not first met his contractual obligations, such as supplying invoices, parts, or payments which were necessary for the other party to perform

213. See *CBS Inc. v. Islamic Republic of Iran*, 25 Iran-U.S. Cl. Trib. Rep. 131, at ¶ 57 (1990).

214. See *Aeronutronic Overseas Services, Inc. v. Islamic Republic of Iran*, 11 Iran-U.S. Cl. Trib. Rep. 223, at ¶ 26 (1986) (declaring that the test applied by the Tribunal, when determining the correct date for the conversion into U.S. dollars of rial amounts found payable, is to select the date on which the obligation became due and to apply the rate of exchange applicable on that date in making conversion). However, this court also states that to qualify for conversion, the Tribunal must be satisfied that the claimant would, in the normal course of business, have repatriated the funds if they had been received on the due date. *Id.*

215. See *Kimberly-Clark Corp. v. Bank of Markazi Iran*, 2 Iran-U.S. Cl. Trib. Rep. 334 (1983) (specifying that the Tribunal has given deference to the facts and terms of the contract with little reference to legal principals which relate to the claim); see also *Pomeroy v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 372 (1983) (stating that the Tribunal did no more than set out the terms and facts surrounding the contract).

216. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 141 (dismissing claims by both the Iranian Air Force and Westinghouse where contractual terms and the practice of the parties did not suggest a valid basis for the claim). But see CLAIMS SETTLEMENT DECLARATION, art. V, *supra* note 168 (giving broad discretion to the Tribunal to decide the applicable law of each claim).

217. See *Teichmann Inc. v. Hamadon Glass Co.*, 13 Iran-U.S. Cl. Trib. Rep. 124, at ¶ 66 (1986) (distinguishing between breach of contract and force majeure, the Tribunal noted that the respondents could not be excused based on force majeure when they were in continuing breach with respect to payment obligations under the contract); see also *MAPP*, *supra* note 18, at 130 (stipulating that a claimant does not have a cause of action unless a breach is found). A breach can occur by complete non-performance of the contract or just of a particular term. *Id.* Alternatively, force majeure meant that the entire contract was generally terminated making it impossible for either party to perform. *Id.*

218. See *Kimberly-Clark Corp.* 2 Iran-U.S. Cl. Trib. Rep. 334 (using a breach of contract analysis to illustrate that non-payment of royalties due amounted to a breach).

219. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 143 (claiming that until the Iranian Air Force delivered prime equipment parts, Westinghouse was forced to cease further contractual efforts). However, the case also indicates that it was the responsibility of Westinghouse and not the Iranian Air Force to supply the required lists. *Id.*

under the contract.²²⁰ In responding to a potential breach of contract, the Tribunal often considers the actions of the parties after the alleged breach occurred.²²¹ If one or both parties cease performance under the contract because of the breach, the Tribunal will most likely conclude that a breach has occurred.²²² However, if the parties resume performance despite the alleged breaching event, then the Tribunal construes such action as a waiver of the contractual provision which defines when a breach could be declared.²²³

After establishing breach of contract, the Tribunal takes a unique approach in assessing whether damages should be allowed for the breach.²²⁴ In determining damages for breach of contract, the Tribunal requires the party alleging the breach to establish causation between the breaching act and the value of the damages claimed.²²⁵ If no value for damages can be ascertained from the breaching events, then no award will be made despite the breach of contract.²²⁶ This position taken by the Tribunal only applies in cases where the contracting parties did not clearly indicate the value of goods or services in the contract.²²⁷ In the event that the parties do include damage provisions for breach of contract, the Tribunal will generally enforce those provisions.²²⁸

220. See *id.* at ¶ 126 (outlining a claim by the Iranian Air Force indicating that Westinghouse failed to provide the necessary contractually required computer specialist). The basis for this claim is that the work of the radar specialist could not be provided until the computer specialist first performed their functions under the contractual agreement. *Id.*

221. See *id.* at ¶ 150 (tracing the letters, memorandum and correspondence between the parties to determine if a breach occurred and who was in fact at fault).

222. See *General Electric Co. v. Islamic Republic of Iran*, 26 Iran-U.S. Cl. Trib. Rep. 148, at ¶ 30 (1991) (stating that a breach of contract is likely to be found in cases where the parties have violated a term of the contract unless their behavior after the alleged breach indicates the contrary).

223. See *id.* (holding that the substitution of work effort, once accepted, is deemed to be a waiver of performance under the contract). The Tribunal declared that the acceptance of alternate services is considered constructive substitution. *Id.* While the failure to perform as a condition precedents is considered a constructive partial termination of the remaining contractual terms. *Id.*

224. See *Agrostruct International v. Iran State Cereals Org.*, *infra* note 225 (stating that causation is required before a breach can be established).

225. See *Agrostruct International Inc. v. Iran State Cereals Org.*, Award 358-195-1, at ¶ 146 (1988) (holding that the claim was dismissed because Agrostruct had not established a sufficient causal link between Cereal's delays in opening the letter of credit and any loss to the business which may have occurred).

226. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 190 (indicating that the Tribunal looked to the terms of the contract when assessing valuation of goods or services). But see *Gould Marketing Inc.*, 3 Iran-U.S. Cl. Trib. Rep. 147 (stating that damages would be assessed based on the extent of performance up until the date of breach).

227. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶¶ 234-35 (specifying that the Tribunal gives considerable deference to the terms of the contract that both parties had previously bargained for).

228. See *General Electric Co.*, 26 Iran-U.S. Cl. Trib. Rep. 148; See also *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 145 (listing damages claimed by General Electric including those arising from: (a) items delivered but not paid for (b) products resold at a discount rate; (c) products resold to other customers in the ordinary course of business; (d) unsold items; and (e) incidental damage). The Tribunal was reluctant to allow damages unless the parties included such provisions in their contract. *Id.*; see also BLACK'S LAW DICTIONARY 391 (6th ed. 1990) (defining incidental damages as those resulting from a seller's breach of contract including any commercially reasonable charges).

The Tribunal ordinarily enforces contractual clauses limiting or excluding a party's liability or limiting a party's contractual remedies for breach.²²⁹ In cases where a contractual provision excludes consequential damages,²³⁰ the Tribunal has indicated that there is no obstacle in enforcing such a clause, absent unreasonable or unconscionable behavior.²³¹ In deciding the appropriateness of limiting damages, the Tribunal recognizes the principals of other legal systems.²³² Generally, the Tribunal has adopted the view of other legal systems that limitation of liability clauses will not be given effect for a specific default when the default arose through intentional wrong or gross negligence on the part of the party invoking the limitation.²³³

When drafting a contract, a legal practitioner must consider several factors effecting the overall success of the investment. This includes the applicable law, appropriateness of terms to include in the contract, as well as, possible provisions for protecting one from breach of contract.²³⁴ In addition to legal aspects of the contract, the practitioner must make other recommendations which may ultimately effect the success of the investment.²³⁵ In considering all factors, the practitioner should be prepared to advise her client about how to protect an investment and to offer alternative options available to the client.²³⁶ This may include an awareness of where to find financing and who will provide insurance coverage for the investment.²³⁷

V. CREATING A SUITABLE ENVIRONMENT FOR INVESTMENT

Since planning an investment would not be complete without first obtaining financing or insurance coverage for the investment, the following segments are

229. See *Itel International Corp. v. Social Security Organization of Iran*, 24 Iran-U.S. Cl. Trib. Rep. 272, at ¶ 53 (1990); see also *American Bell International Inc. v. Islamic Republic of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 74, 90 (1984).

230. See BLACK'S LAW DICTIONARY 390 (6th ed. 1990) (explaining consequential damages as such loss or injury which does not flow directly from the breaching act of the party but only from some of the results of that act).

231. See *Westinghouse Electric Corp.*, Award No. 579-389-2, at ¶ 265-66 (rejecting the claim of the Iranian Air Force to exclude Westinghouses' limitation of liability clause due to a lack of facts supporting the conclusion that the limitation of liability is unconscionable).

232. See *id.* at ¶ 266 (allowing recovery based on two contract clauses excluding Westinghouse Liability). The Tribunal indicated that other legal systems recognized and upheld limitation of liability clauses. *Id.*

233. See *id.* at ¶ 265 (citing *American Bell International v. Islamic Republic of Iran*) (recognizing that many legal systems will not give effect to a limitation of liability clause if the breaching party was grossly negligent).

234. See *supra* 193-233 and accompanying text (focusing several elements that the Tribunal used when analyzing contract claims).

235. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 145 (endorsing candid advice to clients although not legally required).

236. See *id.*

237. See *infra* 242-98 and accompanying text (explaining the current state of Iranian financing and insurance programs, and alternate means of acquiring these resources).

included to give a practitioner a comprehensive picture of an investment in Iran.²³⁸ These segments begin by discussing the current availability of insurance and financing in Iran.²³⁹ They continue by establishing what foreign investors have done to compensate for Iran's present shortage of financing and insurance.²⁴⁰ Finally, these segments conclude by specifying how Iran is making serious attempts to rectify these demands in order to supply adequate levels of financing and insurance to all of its foreign investors.²⁴¹

A. Financing the Investment

A host country's ability to support foreign investment is crucial to that country's capacity to sustain continuous and successful veins of investors within that nation.²⁴² Unfortunately, Iran has been unable to meet these demands expected of its potentially booming industrial economy for several reasons.²⁴³ Iran's net foreign assets have decreased to less than US\$6.5 billion in 1997 due to the effects of Iran's 1980s war with Iraq which contributed to Iran's depressed economy.²⁴⁴ Iran's currency shortage is directly related to its declining oil sales and a national campaign to distribute money to existing foreign debtors.²⁴⁵ Limited hard currency holdings have been allocated to foreign enterprises, but only those in support of state-sponsored projects.²⁴⁶ Until Iran can regain its economic strength and develop a surplus for foreign investment, foreign investors must rely on their own countries to finance projects.²⁴⁷

238. *See id.* (emphasizing the importance of insurance and financing to the success of any well-planned investment).

239. *See id.*

240. *See id.*

241. *See id.*

242. *See* Glain *supra* note 2 (indicating that Iran's inability to extend credit to investors has frustrated Iran's attempts to lure foreign investors to Iran). At a recent trade show in Iran, foreign businesses displaying their goods were disappointed to find that Iran lacks funds to invest in their merchandise. *Id.*; *see also* Pearl, *supra* note 1 (stating that the Iranian economy is stagnating and is in desperate need of capital to finance local and foreign projects).

243. *See supra* notes 244-47 and accompanying text (delineating the reasons for Iran's depressed economy).

244. *See* Glain, *supra* note 2 (unofficial estimate by Iranian economics journalist suggesting that Iranian foreign assets may be down to US\$6.5 billion); *see also* Pearl, *supra* note 1 (explaining how Iran altered currency exchange rates during the 1980s which eventually lead to greater budget deficits and higher inflation).

245. *See* Glain, *supra* note 2 (maintaining that Iran's number one export, oil products, is down resulting in a decrease in Iran's currency surplus). Iran has adopted an aggressive campaign to repay foreign debts. *Id.* Iranian banks declared imports financed outside the country to be contraband, which further affected foreign investment. *Id.*

246. *See id.* (stating that a German engineer, who operated a state-run dairy in Iran, suggested that payments to state businesses may take up to a year).

247. *See id.* (indicating that foreign investors can deposit 100% of the value of the transaction in a local Iranian bank which would then use the funds to pay off the seller of the goods).

Several countries have attempted to increase their economic and political influence in Iran during the past several months by supporting investments.²⁴⁸ Recently, Italy has opened a US\$1.2 billion medium and long-term line of credit for Italian investment projects in Iran, with an additional US\$120 million in short-term credit.²⁴⁹ Italian exports in Iran exceeded US\$870 million in 1997, with Italy reciprocally purchasing US\$1.8 billion in Iranian oil products.²⁵⁰ Additionally, Italy has been interested in encouraging investments in metallurgy, telecommunications, and petrochemical, and has financed Italian enterprises primarily for these types of businesses.²⁵¹ As a result, over eighty Italian businesses have recently embarked on Iran looking for investments backed by Italian based funding.²⁵²

Other countries have followed Italy's aggressive lead by funding their own investors.²⁵³ For instance, Belgium's General Bank has provided a US\$220 million line of credit to Iranian banks for Belgian exports of goods to Iran.²⁵⁴ Several other countries, including Germany²⁵⁵ and France, have followed by financing billion dollar foreign investment projects in Iran.²⁵⁶ Businesses that have been excluded from investing in Iran remain to be only U.S. companies prohibited by I.L.S.A. imposed sanctions.²⁵⁷ European companies, on the other hand, are developing solid

248. See *Italian Foreign Trade Minister in Iran to Drum up Business*, AGENCE FR. PRESSE, Oct. 6, 1998 (suggesting that Italy desires to increase its economic presence in Iran).

249. See *Trade Finance a Supplement to Project Finance, Export Finance, Europeans Resume Iranian Credit Lines*, PROJECT & TRADE FIN., Sept. 10, 1998, at 12 [hereinafter *Trade Finance*] (discussing how the Italian Banks have extended lines of credit to Italian businesses investing in Iran).

250. See *Italian Foreign Trade Minister in Iran to Drum up Business*, *supra* note 248 (explaining that Giorgio Fossa, president of employer's association, was committed to increasing Italian investments in Iran). Italy, as Iran's second largest trading partner, purchased several billion dollars in oil products from Iran. *Id.*

251. See *id.* (declaring that Italy is predominantly interested in Iran's oil industry, but is also willing to pursue developments in the Iranian telecommunications and steel sector).

252. See *id.* (claiming that both Iranian and Italian officials are attempting to solidify trade agreements by making commitments to support investments).

253. See *infra* notes 254-56 and accompanying text (listing several foreign business entities that have taken a recent interest in investing in Iran); see also *Germany Loses Out In Iranian Market*, HANDELSBLATT, Aug. 4, 1998, at 23 (indicating that Italy, Austria and Switzerland have all increased provisions for exports to Iran during the last several months).

254. See *Trade Finance*, *supra* note 249, at 12 (indicating that Belgian funds are being channeled through six Iranian banks including Bank Melli, Bank Saderat, Bank Meflat, Bank Sepah, Bank Tejarat, and the Bank of Industry and Mines). This financing, which has been insured by Belgium's Generale Bank, is intended for a general purpose to fund Belgian exports to Iran. *Id.*

255. See *Germany Loses Out In Iranian Market*, *supra* note 253 (declaring that German investment in Iran increased by 34% in 1997, which was the largest increase in the past four years). However, Germany may lose out to other countries on securing its share of Iranian businesses if it does not increase the volume of investment soon. *Id.*

256. See *Trade Finance a Supplement to Project Finance, Export Finance, Europeans Resume Iranian Credit Lines*, *supra* note 249 (explaining that France has been the most active country in re-building its trade links with Iran).

257. See *id.* (stating that U.S. businesses have placed a great deal of pressure on Congress to remove I.L.S.A. imposed restrictions).

business relationships with Iran while promoting growth in the Iranian economy with foreign based capital.²⁵⁸

Meanwhile, Iran is attempting to raise funds for potential foreign investors and to create state based incentives for these investments.²⁵⁹ Thus far, Iran has developed a new national economic policy encouraging an aggressive campaign to raise money locally.²⁶⁰ Such projects include promotion of the sale of public bonds and investments in pension funds.²⁶¹ Also, Iran has encouraged existing petrochemical businesses to expand their operations to include sales of shares to the public.²⁶² Iran has offered incentives to foreign investors by extending tax breaks and decreased operating costs to businesses working in Iranian Special Trade Zones.²⁶³ However, until Iran can effectively reconstruct its financial network, investors must rely on foreign funding to support their projects.²⁶⁴

In addition to the problems with financing, many investors have been dissuaded from investing in Iran because of Iran's inability to protect foreign ventures.²⁶⁵ Some fear that internal problems will occur in Iran, similar to those during the 1979 Revolution, which may result in contractual breaches affecting foreign businesses.²⁶⁶ As a result of Iran's turbulent economic history,²⁶⁷ many foreign investors have found the need to protect their investments with national

258. *See id.* (claiming that U.S. businesses prohibited from investing in Iran due to I.L.S.A. sanctions believe that lucrative business opportunities in Iran are being swallowed up by European investors).

259. *See infra* notes 261-263 and accompanying text; *see also Petrochemicals in Iran: Catalyst Needed, supra* note 130 (proclaiming that Iran has been desperate to make up for low petroleum returns which were due to decreased oil prices).

260. *See Petrochemicals in Iran: Catalyst Needed, supra* note 130 (alleging that Iran's deputy oil minister, Mohammed Reza Nematzadeh, has promised to raise US\$12 billion in funds, including some directly through public investment).

261. *See id.*

262. *See id.* (suggesting that "floatation" of shares on the Tehran Stock Exchange may contribute towards the raising of US\$12 billion projected by the Iranian foreign minister).

263. *See id.* (explaining that in addition to tax breaks, investors would be offered access to feedstock supplies at below market rates); *see also infra* note 271 and accompanying text (delineating various Free Trade Zones established in Iran which provide for special incentives to investors).

264. *See Glain, supra* note 2 (claiming that Ahmad Mortazavi, director general of Iran's Organization for Investment, Economic, & Technical Assistance stated that the Iranian government is making every effort to support investors). Until Iran can provide funding to investors, businesses must continue to rely on their own countries for economic support. *Id.*

265. *See Petrochemicals in Iran: Catalyst Needed, supra* note 130 (suggesting that Iran's ambitious plans to support foreign investment in Iran have been unsuccessful); *see also Glain supra* note 2 (indicating that the Iranian government desires to introduce reforms to facilitate trade and investment in Iran).

266. *See Maria Kielmas, Cover For Iran Trade Resumes: European Agencies End Hiatus on Political Risk Coverage For Iran, Bus. INS., Aug. 10, 1998, at 17* (stating that European companies demand protection for their investments because of the uncertainty and instability of Iran economically and politically); *see also Iran Woos Foreigners To Invest In Free-Trade Zones, AGENCE FR.-PRESSE, Oct. 28, 1998* (specifying measures taken by Iranian legislation to protect investors from losses occurring from unstable national affairs).

267. *See supra* notes 17-46 and accompanying text (describing events relating to the Iranian Revolution which disrupted many investments in the 1970s).

insurance.²⁶⁸ But, as with financing, obtaining insurance has been an obstacle to many foreigners that lack total support from their country of origin.²⁶⁹

B. Protecting the Investment

To lessen these obstacles, the Iranian government made concrete attempts to provide insurance for its foreign investors.²⁷⁰ The Iranian Parliament urged approval of legislation that would protect foreign investments in Iran's Free Trade Zones, including the Gulf Islands of Kish and Qeshm, and the southeastern port of Shabahar on the Oman Sea.²⁷¹ Further, the proposed bill would protect investors in the event that another revolution occurred and foreign property was expropriated by Iranian nationals.²⁷² This proposal was a direct response to the demands of foreign nationals requesting assurances which would protect them against possible Iranian nationalism²⁷³ similar to that resulting in the U.S. hostage situation in 1979²⁷⁴ and the subsequent Iran-U.S. Claims Tribunal.²⁷⁵

In the meantime, some foreign investors have been able to invest in Iran with the security of limited insurance from their own countries.²⁷⁶ The United Kingdom's Export Credit Guarantee Department has recently resumed US\$160 million of short-term official insurance coverage for United Kingdom (UK) exports to Iran.²⁷⁷ The UK has also agreed to discuss restoration of medium-term insurance if the

268. See *infra* notes 277-93 and accompanying text (explaining foreign efforts to provide insurance to protect national investments).

269. See Kielmas, *supra* note 266 (emphasizing that many foreign investors are unwilling to take the risk of investing in Iran because of Iran's policy toward buying back property). Small business investors are especially concerned because the Iranian Constitution prohibits any foreign investor from owning any assets in the gas and oil industry. *Id.*

270. See Glain *supra* note 2; see also *Iran Woos Foreigners To Invest In Free-Trade Zones*, *supra* note 266 (indicating that the Majlis, the Iranian Parliament, has attempted to pass measures compensating foreign investors for losses incurred in case a nationalization drive occurs). But see *Petrochemicals in Iran: Catalyst Needed*, *supra* note 130 (holding that the Council of Guardians in the Iranian Parliament rejected the bill on constitutional grounds early in 1999).

271. See *Iran Woos Foreigners To Invest In Free-Trade Zones*, *supra* note 266 (relaying that Morteza Alvira, head of Iran's Free Trade Zones Organization, stated that the bill was presented to encourage investments in Free Trade Zones, as well as, other areas).

272. See *id.* (postulating that the driving force behind the bill was to protect foreign nationals in the case of a nationalization drive or related legislation).

273. See generally Kielmas, *supra* note 266 (indicating that investors are ready to make investments once they receive guarantees for their investments from the Iranian government).

274. See *supra* notes 42-43 and accompanying text (discussing the Iranian revolution which culminated in 1979 with the taking of hostages at the American Embassy in Tehran).

275. See *supra* notes 50-52 and accompanying text (describing the establishment of the Iran-U.S. Claims Tribunal).

276. See *infra* notes 277-93 and accompanying text.

277. See *Iran: UK and EU Partners Offer Export Insurance Cover*, MIDDLE E. ECON. DIG., Aug. 7, 1998, at 16 (suggesting that the UK resumed short-term insurance for exports to Iran after a four year restriction on insurance). Beckett stated that resuming insurance was directly related to improved progress in managing the Iranian economy by President Khatami and his ministers. *Id.*

implementation of short-term insurance is well received in Iran.²⁷⁸ According to the UK Board of Trade President, Margaret Beckett, the reintroduction of this type of insurance in Iran will be welcomed by British exporters.²⁷⁹ The insurance will also indirectly act to improve relations between Iran and the U.K. by encouraging free trade between the two countries.²⁸⁰

Italy, Iran's second-largest European trading partner, also encouraged investments in Iran by providing Italian nationals with insurance coverage.²⁸¹ Italy's Sezione Speciale per l'Assicurazione del Credito all'Esportazione or SACE, agreed to provide insurance to Italian small and medium sized firms.²⁸² SACE also agreed to insure Italy's Mediobanco, a bank that extended a \$1.2 billion line of credit to six of Iran's local banks.²⁸³ Italy's long history of investment with Iran has proven to be crucial in protecting both Italian and Iranian investments during this time of Iranian economic growth.²⁸⁴

Germany's Hermes Kreditversicherung, a German insurance company, also restored insurance coverage to German investors in Iran.²⁸⁵ The German insurance provider agreed to provide a ceiling of \$2.8 million short-term coverage for each project and \$16.6 million maximum coverage for each medium-term transaction.²⁸⁶ However, Germany has only agreed to provide insurance coverage if Iran and its banks can guarantee that Iran's economy is financially stable enough to support

278. See *Trade Finance*, *supra* note 249 (maintaining that the UK will not agree to implement a medium-term insurance policy until it has had a chance to observe the Iranian economy under the political and economic pressures of decreased oil prices and sales).

279. See Ian Black, *British Joins To Woo Tehran As Relations Thaw Iran*, *GUARDIAN*, (London) Sept. 8, 1998, at 12 (explaining how these types of insurance coverage are especially welcomed by British exports, especially in light of recent developments of improved relations between the United States and Iran); see also *UK and EU Partners Offer Export Insurance Cover*, *supra* note 277 (quoting Beckett in her assessment of the value of insurance to British businesses investing in Iran).

280. See *Iran: UK and EU Partners Offer Export Insurance Cover*, *supra* note 277 (claiming that promotion of insurance to British exporters will strengthen trade relations with Iran).

281. See *infra* notes 282-84 and accompanying text.

282. See Kielmas, *supra* note 266 (explaining how Italy has proposed to restore short-term insurance of 180 days for letters of credit guaranteed by Iranian banks). This proposal comes after several Italian businesses were working in Iran without any coverage available to them. *Id.* Medium term insurance will also be restored as determined on case-by-case basis, if it generates income for the Italian system and helps to develop the Iranian economy. *Id.*

283. See *Iran: UK and EU Partners Offer Export Insurance Cover*, *supra* note 277 (listing Iranian banks which include Bank Melli, Bank Saderat, Bank Meflat, Bank Sepah, Bank Tejarat, and the Bank of Industry & Mines).

284. See *Italian Trade Minister in Iran To Drum Up Business*, *supra* note 248 (stating that Iran's second largest European trading partner, Italy, has taken several steps to improve relations with Iran and encourage Italian investment there).

285. See *Iran: German Agency Resumes Export Cover*, *MIDDLE E. ECON. DIG.*, Aug. 28, 1998, at 10 (indicating that the German government implemented the insurance in July, 1998, however, no German business have yet taken advantage of the coverage).

286. See *id.*

German investments.²⁸⁷ Despite this coverage, German investors have been hesitant to make new investments in Iran until Iran provides additional insurance coverage for their investments.²⁸⁸

Other foreign investors, including the Korea Export Insurance Corp., a Korean insurer of Hyundai shipbuilders, agreed to provide export insurance to Iran.²⁸⁹ This \$350 million contract for the construction of oil tankers between Iran and Korea was made to protect the investment of Korean firms in case of a default in payment by the Iranian shipping manufacturers.²⁹⁰ Countries, including Belgium²⁹¹ and France,²⁹² have also provided limited insurance to investors from their countries investing in Iran.²⁹³ However, the general consensus among these foreign investors is that Iran must do its part by providing its own insurance to investors.²⁹⁴

Iran recently attempted to expand its insurance to protect foreign persons by providing automobile and health insurance to foreigners, but investors are still left unprotected under most of Iranian insurance policies.²⁹⁵ If Iran wants to become competitive enough to attract foreign investors, Iran's parliament must pass new forms of insurance that protect foreign investors and their investments.²⁹⁶ Even though Iran has made slow progress in affecting change, Iran is still moving in a

287. *Id.* (indicating that Hermes requested a guarantee from the Iranian Economy and Finance Minister before insurance coverage is provided to German investors in Iran).

288. *See* Kielmas, *supra* note 266 (stating that all insurance is subject to approval of a German government committee and is decided on a case by case basis); *see also* *Iran: German Agency Resumes Export Cover*, *supra* note 285 (suggesting German investors are cautious about plunging into an investment in Iran). *But see* *Iran and Europe: The Radicals Regret*, *THE ECONOMIST*, Oct. 17, 1998, at 51 (stating also that despite Germany's attempts to restore positive business relations with Iran, tension remained high after Germany was unable to negotiate a trade with Iran for the return of a German engineer sentenced to death by Iranian courts).

289. *See* *US: \$350 Million Export Insurance for Daewoo, Hyundai Contracts*, *ASIA PULSE*, Aug. 6, 1998 (indicating that insurance will be provided to support US\$350 million in ship building contracts). Daewoo is scheduled to build five oil tankers at US\$46 million each while Hyundai will build four oil tankers at US\$30 million each). *Id.*

290. *See id.* (explaining that in cases of default by Iran the Korean export insurance will reimburse the Korean Daewoo and Hyundai Corporations).

291. *See* *Trade Finance*, *supra* note 249 (stating that Office National du Dueroire, the Belgian credit insurer, will provide coverage to Belgian businesses investing in Iran).

292. *See* Kielmas, *supra* note 266 (indicating that Paris based Coface, resumed underwriting insurance for credit risk in 1996). All coverage provided by Coface is only given once the Iranian banks provide a guarantee). *Id.*

293. *See generally id.* (affirming that the insurance provided is only for exports from their country of origin that are investing in Iran with the permission of the State).

294. *See id.* (emphasizing that many foreign insurance providers will not approve the coverage unless Iranian banks also guarantee the risk).

295. *See id.*

296. *See* KALEIDOSCOPE, (1998 ABC-CLIO, Inc. Iran) (indicating that lasting improvements in Iran's economy may require the support of the conservative Islamic faction still firmly situated within the Iranian government).

positive direction toward its future.²⁹⁷ Iran has made diligent efforts to provide a hospitable environment for its investors while being receptive to the plethora of investors that have embarked on Iran thus far.²⁹⁸

VI. CONCLUSION

As one of the last investment frontiers, Iran and other friendly countries in the Middle East, are ideal for investment.²⁹⁹ Investors will find that there is much to be gained from venturing into Iran during this time of economic growth.³⁰⁰ Iran's rich oil reserves,³⁰¹ shortage of goods,³⁰² and new policy toward Western nations³⁰³ make it a suitable time to plan an investment in Iran.³⁰⁴ If relations with Iran continue to improve, international practitioners must be thoroughly prepared to successfully plan these transactions.³⁰⁵ An understanding of Iran's history,³⁰⁶ economy,³⁰⁷ and availability of insurance and financing³⁰⁸ will make present investment plans in Iran much more feasible.³⁰⁹ While these considerations are invaluable, the most crucial

297. See Burns, *supra* note 115 (stating that Iran is moving toward reconciliation between itself and the West); see also Clinton: *Let's Renew Friendship With Iran*, *supra* note 5 (specifying that President Clinton believes that good relations between the United States and Iran can be restored).

298. See Iran Woos Foreigners To Invest In Free-Trade Zones, *supra* note 266 (outlining how the Iranian parliament has attempted to create tax and other incentives for investors willing to invest in Iran's specially designated Free Trade Zones). Iranian Parliament also attempted to pass legislation to increase insurance coverage to foreign investors. *Id.*

299. See Hamilton, *supra* note 97, at 18 (emphasizing that the potential for investment in all oil rich countries can not be ignored by the West).

300. See Political Outlook, *supra* note 2 (suggesting that foreign relations have undergone considerable changes in the past twelve months since President Khatami was elected in May 1997); see also Iran: Relief On Debts Sought, Despite Fall in Value, *supra* note 105 (stating that foreign debts in Iran fell by US\$800 million during the first quarter of 1998).

301. See U.S. Isolated in Policy of Trying to Isolate Iran, *supra* note 90 (claiming that Iran possesses the world's second largest natural gas reserves).

302. See Glain, *supra* note 2 (delineating Iran's shortage of goods and need of services); see also *supra* notes 147-54 and accompanying text (suggesting that Iran's agricultural equipment has aged over the past two decades giving Iran a dire need for replacement parts).

303. See *supra* notes 110-36 and accompanying text (describing the recent developments between Iran and the United States that have resulted in improved foreign policies between the two countries).

304. See China: West Offers Olive Branch to Iran, *supra* note 5 (repeating a statement from French Foreign Minister, Vedrine Hudert reiterating the indispensable importance of Iran to the region); see also Political Outlook, *supra* note 2 (indicating that the outside world is responding to policy changes within Iran).

305. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 145 (outlining the role of an attorney as legal, as well as economic advocate for his clients).

306. See *supra* notes 17-52 and accompanying text (discussing the rise and "fall" of the Iranian government during the 1960s through late 1970s).

307. See *supra* notes 121-24 and accompanying text (expressing explicit business dealings taking place between Iran and the United States during the 1970s).

308. See *supra* notes 242-95 and accompanying text (explaining insurance and financing options currently available in Iran).

309. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 145 (advocating political, economic, and moral advice to one's client).

factor to the practitioner may be an awareness of the law which applies to the contractual agreement.³¹⁰

In this regard, the outcome of the Iran-U.S. Tribunal decisions on past investments in Iran will be consequential to a favorable outcome of a transnational business transaction in Iran's future.³¹¹ Even though the Tribunal decisions are not *stare decisis* or binding precedent,³¹² the decisions may be argued to apply to potential disputes similar to those heard by the Tribunal.³¹³ An analysis of the Tribunal decisions will help a practitioner plan for several contingencies that may occur in an investment in Iran.³¹⁴ This may include the possibility of force majeure or frustration of the purpose of the contract,³¹⁵ breach of contract,³¹⁶ and the deference given to contractual terms by the Tribunal regarding settling disputes arising by either party.³¹⁷ Accordingly, the decisions of the Tribunal can be used as an indispensable tool for planning a successful investment in Iran during its new era of economic development.³¹⁸

310. See BORN, *supra* note 142, at 24 (stating the need to devise a well-planned conflict of law provision within a transnational contract).

311. See Caron, *supra* note 4, at 156 n.3 (citing HOLTZMANN, SOME LESSONS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS, at 16) (indicating that the Tribunal's decisions are cited in the Restatement Third of the Foreign Relations Law of the United States).

312. See BROWER & BRUESCHKE, *supra* note 5, at 669 (proclaiming the Tribunal's precedential value to internationally accepted principals of commercial law).

313. *Id.* (emphasizing the Tribunal's significance to transnational investments).

314. *Id.* (postulating that the impact of the Tribunal decisions will be the most significant body of case law directed at international arbitration). But see Caron, *supra* note 4, at 156 n.4 (citing M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 202 (1986) (questioning the value of the Tribunal decisions because of its purely political nature).

315. See *supra* notes 193-204 and accompanying text (explaining the outcome of contractual disputes arising from the Iranian Revolution taking place between 1978-79).

316. See *supra* notes 217-34 and accompanying text (discussing causes of action resulting from events other than force majeure).

317. See *supra* notes 205-16 and accompanying text (describing the major areas in which the Tribunal has distinguished cases in favor of either party based on analysis of the terms of the contract and the actions of the parties prior and subsequent to a contractual breach).

318. See Lillich and Bederman, *supra* note 135, at 463 (postulating that the decisions of the Tribunal may be a valuable source of opinion to the law of international claims).